Case Number: 1802505/2021(V)

1803270/2021

EMPLOYMENT TRIBUNALS

Claimant: **Mr W Irish**

Respondent: **Acorn Construction (Yorkshire)**

Heard by CVP in Sheffield **On: 2 and 3 September 2021**

Before: **Employment Judge Brain**

Representation

Claimant: **Mr M Rudd, Counsel**
Respondent: **Miss C Ibbotson, Counsel**

RESERVED JUDGMENT

The Judgment of the Employment Tribunal is that:

1. The claimant's breach of contract claims succeed:
   1.1. The respondent shall pay damages to the claimant in the sum of £10,000 arising from the respondent's breach in failing to pay to the claimant the bonus due to him at the end of the tax year 2019/2020.
   1.2. The respondent shall pay damages to the claimant in the sum of £2,580 arising from the respondent's failure to pay the contractually agreed employer's pension contributions into the relevant pension scheme.
2. The claimant's complaint that the respondent made an unauthorised deduction from his wages for the period between 1 November and 23 November 2020 succeeds. The respondent shall pay to the claimant the sum of £3,692.93 being the amount of the unauthorised deduction.
3. The claimant's complaint that the respondent made an unauthorised deduction from his wages by failing to pay to him the amount due for holidays accrued but untaken as at 23 November 2020 and the claimant's complaint that the respondent failed to pay to him compensation for holiday accrued due but untaken as at that date succeeds. The respondent shall pay to the claimant the sum of £1,384.62.
4. The respondent's counterclaim is dismissed.

5. The respondent shall pay to the claimant the sum of £17,657.55 within 14 days of the promulgation date set out below.
6. All of the sums stipulated are gross amounts.

REASONS

Introduction

1. The Employment Tribunal heard evidence in this matter on 2 and 3 September 2021. After receiving helpful submissions from counsel, the Tribunal directed that given the lateness of the hour the judgment in this matter would be reserved. There now follows reasons for the judgment that I have reached.
2. The claimant brings the following complaints against the respondent:
   2.1. That the respondent was in breach of contract in failing to pay employer's pension contributions.
   2.2. That the respondent was in breach of contract by failing to pay to the claimant a contractually agreed bonus due at the end of the tax year 2019/2020.
   2.3. That the claimant suffered an unauthorised deduction from wages as the respondent did not pay his salary for the period between 1 and 23 November 2020.
   2.4. That the respondent made an unauthorised deduction from wages by failing to pay to him the sum due for holiday accrued but untaken as at 23 November 2020. (This complaint is also run as one of a failure to pay compensation for holiday accrued due as at the effective date of termination of the contract).
3. The respondent makes a counterclaim against the claimant arising out of the claimant's alleged breach of contract. The respondent seeks damages by way of compensation for the claimant having allegedly diverted business away from the respondent.
4. The Tribunal heard evidence from the claimant. On his behalf, evidence was received from:
   4.1. Graham Foxcroft. He is the chief executive officer of Triton Group Holdings Limited and its various subsidiaries including Triton Project Solutions Limited (referred to in the judgment from time-to-time as '*Triton'* and *'TPS'*).
   4.2. Ross Tilston. He is a former employee of the respondent.
   4.3. James Pashley. He is a former employee of the respondent. He was employed as a general manager between 1 April 2014 and 23 November 2020.
5. Evidence was given on behalf of the respondent by Mrs Rebecca Nutter. She and her husband Andrew are the directors of the respondent.
6. In their pleaded case, the respondent said (in paragraph 2 of the grounds of resistance) that they are *"one of the UK's largest providers of indoor and outdoor scaffold based event structures and specialise in the supply and installation of a wide range of temporary structures and ancillary support*

services to its clients, including temporary structures, stages and power". Mrs Nutter gave unchallenged evidence to this effect in paragraph 1 of her witness statement.

7. The claimant was employed in the capacity of a sales and business development director. (Notwithstanding his title, the claimant at no stage was a statutory director of the respondent).

8. In circumstances which the Tribunal shall relate, the claimant, Mr Tilston and Mr Pashley were summarily dismissed by the respondent in November 2020.

The issues in the case

9. Before descending into the factual findings, it is helpful to set out the list of issues to which this matter gives rise. The respondent's representative submitted what I was told was an agreed list of issues on the afternoon of 1 September 2021. This is as follows:

'Unpaid Pension Contributions

1. *Was the claimant entitled to receive employer pension contributions equivalent to 5% of his salary during the period 1 July 2019 to 23 November 2020 from the respondent and, before that, the company from which the claimant TUPE transferred to the respondent, Acorn Scaffolding (Yorkshire) Limited ('Scaffolding')?*
2. *What employer pension contributions were made within this time period (the parties agree that: no employer pension contributions were made in the period 1 July 2019 to 31 December 2019; and employer pension contributions of 3% were made in the period 1 January 2020 to 23 November 2020)?*
3. *Was the claimant's entitlement to employer pension contributions at all times conditional upon employee pension contributions of 3% being made?*
4. *If so, did the fact that employee pension contributions were not made during the period 1 July 2019 to 31 December 2019 disentitle the claimant to employer pension contributions for that period?*
5. *Has the claimant waived any entitlement to employer pension contributions by his conduct?*
6. *Did the claimant not in fact suffer any financial loss in relation to the failure to make employer pension contributions as a consequence of the respondent overpaying the claimant in the region of £5,000.*

Bonus

7. *Was the claimant entitled to a bonus of £10,000 to be paid in March 2020?*
8. *Did the claimant's entitlement to and the respondent's liability to pay the bonus cease to exist because the claimant committed a repudiatory breach of contract, entitling the respondent to dismiss him for gross misconduct?*
9. *Has the claimant waived any entitlement to the bonus by his conduct?*

November 2020 salary

10. Did the respondent pay the claimant in respect of the salary for the period 1 November 2020 to 23 November 2020 (the parties agree that it did not)?

11. Was the respondent entitled to withhold payment in this respect because of an overpayment to the claimant of approximately £5,000?

Holiday Pay

12. As at the date on which his employment terminated (23 November 2020) had the claimant accrued more holiday than he had used and was he entitled to be paid in lieu of this?

13. Was the respondent entitled to withhold payment in this respect because of an overpayment to the claimant of approximately £5,000?

Counterclaim

14. Did the claimant, during his employment with the respondent, act in breach of his obligations as an employee whereby he diverted sales revenue away from the respondent that the respondent would have received but for his breach of contract?

Remedy

15. If any of the complaints of the claimant and/or the respondent are well-founded what is the appropriate remedy?'

10. The basis of the counterclaim is pleaded in paragraphs 16 to 18 of the respondent's grounds of resistance in the following terms:

"16 In April 2020, the respondent undertook work for a customer called Deboer. [I interpose here to say that the correct spelling is 'De Boer']. *This was for the provision of temporary morgue facilities in London. The claimant was the main contact for the relationship with De Boer. The respondent now knows that on 4 September 2020, when the claimant was still employed by the respondent, TPS* [Trident Project Solutions Limited] *sent a quote to De Boer for similar work. TPS undertook this work for De Boer in January 2021.*

17 The respondent asserts and claims that the claimant was responsible, during his employment with the respondent, for diverting this business from the respondent to TPS in breach of his contractual obligations as an employee to act at all times with good faith and in the interests of the respondent.

18 The respondent claims damages from the claimant, based on the breach of the employment contract, the loss of profit on this contract that the respondent would have made."

Findings of fact

11. The Tribunal will now make factual findings. There will then be set out a discussion and consideration of the relevant law in order to arrive at the Tribunal's conclusions upon the issues.

12. As mentioned in the list of issues, the claimant was in fact initially employed by Acorn Scaffolding (Yorkshire) Limited *('Acorn Scaffolding'*).

Acorn Scaffolding went into administration on 2 December 2019. It is not in dispute that the undertaking carried out by Acorn Scaffolding transferred to the respondent pursuant to the Transfer of Undertakings (Protection of Employment) Regulations 2006. Pursuant to Regulation 4 of the 2006 Regulations, the rights, obligations and liabilities of Acorn Scaffolding passed to the respondent.

13. Mrs Nutter's evidence (in paragraph 2 of her witness statement) is that the claimant's role primarily was to focus *"on the golf sector".* She went on to say that the claimant *"joined us from a company called Arena that operates in the events sector."* (Her reference to *'us'* is to both Acorn Scaffolding and the respondent, she and Mr Nutter being statutory directors of both).

14. The claimant says in paragraph 1 of his witness that he has had a *"long and successful career"* and has *"established strong relationships with a number of key clients and built a reputation as being reliable and trustworthy."* He describes in paragraph 3 of his witness statement having entered into discussions with Mr Nutter to join Acorn Scaffolding. He had these discussions whilst still in the employ of Arena. It is not in dispute there was an expectation upon the part of the respondent (and Acorn Scaffolding before them) that the claimant would bring some of his clients with him over from Arena. Amongst the clients that it was anticipated the claimant would bring over (and did in fact bring over) was the European Tour which is an annual European professional golfers' tour. Arena had provided services to the organisers of the European Tour. (I shall refer to this now simply as *'the European Tour'*).

15. There is a dispute of fact between the parties as to the date upon which the claimant commenced working for Acorn Scaffolding. The claimant says that he commenced work on Monday 4 March 2019. In paragraph 2 of her witness statement, Mrs Nutter gives the commencement date as 4 April 2019. (This is in fact a Thursday).

16. What is not in dispute is that the claimant's contract with Arena did not terminate until 31 March 2019 and that he was placed upon garden leave for the final month of his employment with Arena. *'Garden leave'* refers to the concept of the employee (normally following service of notice by either party) being relieved of the obligation to perform work but otherwise being subject to the obligations of the contract.

17. The claimant's account was that the chief executive officer of Arena agreed that the claimant could have dealings with the European Tour during his garden leave. This was in recognition of the fact that the first event of the European Tour golf season was to be held in April 2019. Preparations therefore needed to be made during March of that year for the respondent to service the European Tour's needs.

18. In evidence given during cross-examination, the claimant explained that the European Tour's scaffolding contract was to go with him from Arena to Acorn Scaffolding. Arena were to continue providing the European Tour's needs for marquees. Going forward, it was necessary for Arena and Acorn Scaffolding to work together over the 12 events of the European Tour. The claimant helpfully explained that the scaffolding is required in order to enable the construction of marquees on undulating ground. It was suggested to the claimant by Miss Ibbotson that the work undertaken by

the claimant in March 2019 was therefore in Arena's interest in addition to those of Acorn Scaffolding. The claimant replied, "*Yes, that's why this agreement was reached between me and the chief executive officer of Arena to work for Acorn Scaffolding during garden leave."*

19. The respondent's case is that the claimant did not commence his employment with Acorn Scaffolding until April 2019. In support of their case, the respondent pointed to the statement of main terms and conditions of employment which are at pages 47 to 50 of the bundle. This gives a commencement date of Monday 1 April 2019.

20. The commencement date given in the statement of main terms and conditions of employment is different to that cited by Mrs Nutter in paragraph 2 of her witness statement. As I have already said, there she gives a start date of 4 April 2019 (which is a Thursday). Mr Rudd asked her, during cross-examination, if the date given in the statement of main terms and conditions was a mistake. She appeared to be uncertain and replied *"I don't believe so. No – 1st or 4th April 2019 – 4th April".* As the claimant observed, it would be rather odd (although certainly not unknown) for an individual to start work in a senior position on a Thursday as opposed to a Monday.

21. Mrs Nutter accepted that the claimant had shown up in Acorn Scaffolding's yard during March 2019. In addition to the claimant, other members of staff hitherto employed by Arena also moved over to work for Acorn Scaffolding. Mrs Nutter said in evidence during cross-examination, *"He [the claimant] said that he could not work officially until his garden leave was completed. Some of the other guys who were coming over … he came over to the yard for a meeting. The others had started. He came up to introduce them and the various events coming up."* She denied that the claimant was in work most days during March 2019. She said that this was not the case as *"that's why Ross Tilston was in."* (Mr Tilston was one of those who moved with the claimant from Arena to Acorn Scaffolding).

22. The claimant's account was that the statement of main terms and conditions of employment could not "*officially"* give a commencement date of 4 March 2019 because until 31 March 2019 the claimant was employed by Arena and was on garden leave with them. This was difficult evidence to understand given the claimant's account that Arena's chief executive officer was relaxed about the claimant having dealings with the European Tour on behalf of Acorn Scaffolding (which was also for the benefit of Arena as just explained).

23. However, the claimant said that he [Arena's chief executive officer] had not sanctioned the claimant undertaking work for Acorn Scaffolding. This evidence was unsatisfactory and difficult to understand given that the chief executive officer of Arena had effectively sanctioned the claimant having dealings with the European Tour for the benefit of Acorn Scaffolding and that it would not be practicable for preparations to be made for the events commencing in April 2019 without the European Tour having dealings with Acorn Scaffolding.

24. Further, the claimant's printed witness statement gives no detail of the work which he says was being undertaken by him for Acorn Scaffolding during the period of garden leave. Miss Ibbotson on behalf of the

respondent sought to impugn the claimant's credit upon this issue by reference to several documents within the bundle. Firstly, the grounds of claim (in paragraph 2) give a commencement date with Acorn Scaffolding of 4 April 2019. Secondly, the claimant's solicitors wrote a letter to the respondent's solicitors on 9 February 2021. The letter is at pages 279 to 283 of the bundle. This gives a commencement date of 1 April 2019. Thirdly, the schedule of loss (within the bundle at pages 333 and 334) gives the period of service as 4 April 2019 to 23 November 2020.

25. The claimant did not receive a salary or payslip for March 2019. The claimant's account was that an agreement was reached between the parties that he would be paid for March 2019 during the tax year 2019/20. In other words, he would be paid 13 months' salary during the 12 months of that tax year. There is no dispute that the claimant was paid 13 months' salary in this period. The respondent's case is that this was a mistake and that the claimant was overpaid by £5,000 (being one month's gross pay) and that for this reason, the respondent did not pay the claimant his salary for the period between 1 November and 23 November 2020.

26. A further point of dispute between the parties is the level of the claimant's salary. The respondent's case is that the parties agreed that the claimant would be paid a salary of £60,000 per annum. Plainly, this equates to £5,000 gross per calendar month. The claimant's case is that he agreed with Mr Nutter (during the course of negotiations in February 2019) to be paid a salary of £70,000 per annum. However, because this would breach the respondent's salary structure it was agreed that this would be shown in the statement of main terms and conditions as a basic salary of £60,000 together with an unconditional bonus of £10,000 to be paid at the end of March 2020. I shall look at the bonus issue in a little more detail later in these reasons. For now however its suffices to say that the claimant's wage slips during the tax year 2019/20 were commensurate with a basic salary of £60,000 per annum.

27. The waters are further muddied, unfortunately, because of an agreement reached between the parties that the claimant would defer payment of his salary until July 2019. The reason for the deferral is however a point of dispute. The claimant's case is that he did this to assist Acorn Scaffolding's cashflow. The respondent's case is that this was undertaken to assist the claimant who was in a dispute with HM Revenue and Customs *('HMRC'*).

28. We know that ultimately Acorn Scaffolding went into administration in December 2019. On the face of it therefore the claimant's position that there was a cashflow issue has some credibility. That said, there is some merit in Miss Ibbotson's point that deferring £5,000 per month between March or April and July 2019 was a drop in the ocean given the size of Acorn Scaffolding's turnover. Understandably under the pressure of cross-examination, Mrs Nutter did give different figures at different times. However, she spoke of assets to a value of £12 million pounds and £18 million pounds, of Acorn Scaffolding enjoying a turnover of around £15 million pounds and owing £2.6 million pounds to creditors.

29. Upon termination of the claimant's employment, the respondent examined his computer and discovered upon it the agreement entered into by him

with HMRC on 30 September 2020 (which is in the bundle at pages 346 to 349). This is an agreement settling the claimant's tax liability arising from his employment with Arena. The claimant said in evidence that this was a historic dispute and for the last two years of his employment with Arena he had been paid through the *'Pay As You Earn'* system. His evidence was that deferring the wages due to him from Acorn Scaffolding was unconnected with the issue that he had with HMRC from his time at Arena.

30. There was no suggestion in Mrs Nutter's printed witness statement that the claimant's apparent issue with HMRC was drawn to Acorn Scaffolding's or the respondent's attention during the course of the claimant's employment with them. As I say, it was only discovered upon the claimant's laptop following the end of his employment.

31. The reason for the wage deferral appears to have little relevance to any of the issues in the case. What is not in dispute is that the claimant received no remuneration from Acorn Scaffolding until the payslip dated 26 July 2019 (at page 55). This showed that he was paid a total of £10,000 (being two salary payments of £5,000 each). On 30 August 2019 he was again paid £10,000 (page 54). In September 2019 he received his salary of £5,000 only (page 51). Then, for October, November and December 2019 he received his salary of £5,000 per month together with an entry identified in the wage slips (at pages 52, 53 and 59) as *"salary arrears"* in the sum of £1,666.66. Therefore, by the end of 2019, the claimant had been paid the equivalent of nine months' salary of £5,000 per month. On the face of it, that is consistent with the respondent's case that he commenced work in April 2019.

32. Then, the claimant received his regular monthly salary plus *"salary arrears"* of £1666.66 for January, February and March 2020 (pages 56 to 58).

33. The claimant's case therefore is that the three payments identified as *"salary arrears"* in the wage slips for the first three months of 2020 were in satisfaction of the arrears of wages owed to him for the work undertaken between March and December 2019. By March 2020, the claimant had received an amount the equivalent of 13 months of salary payments in the sum of £5,000 gross per calendar month. He had received £65,000 gross between July 2019 and March 2020.

34. The March 2020 wage slip contains an item *"gross for tax to date*" of £64,268.96. This is the figure given in the claimant's P60 for the tax year ended 5 April 2020 at page 309.

35. While on the subject of payslips, it is worth observing at this stage that for the months of June, July, August, September and October 2020 the claimant's salary was made up of furlough pay and furlough top up. The relevant wage slips are at pages 76 to 80 of the bundle. The wage slip for May 2020 (page 81) does not refer to the claimant as being on furlough.

36. Thus, a very precise figure was paid to the claimant by way of salary in the tax year 2019/20. That precision is consistent with the claimant's case of commencing work on 4 March 2019 and being paid for the period between 4 March 2019 and 31 March 2020 within the tax year 2019/20. Plainly, the claimant would have no expectation of receiving a full salary payment of

£5,000 gross for March 2019 given that he did not commence work (on his case) until the fourth day of that month.

37. If, on the respondent's case, the claimant started work on 1 April 2019 one would have expected to see a figure of precisely £60,000 in that tax year's P60 (for the tax year 2019/20). If the commencement date was 4 April 2020, the claimant would then be missing three working days (on 1, 2 and 3 April 2020). Accordingly, one would have expected to see a figure short of £60,000 in the P60 whereas the figure in the P60 at page 309 is plainly in excess of £64,000.

38. The first three wage slips for the calendar year commencing 1 January 2020 contained an item identified as *"salary arrears."* Mrs Nutter sought to blame her payroll manager for erroneously paying these sums to the claimant. No one from the respondent was able to explain to the Tribunal of how the figure of £64,268.96 identified in the P60 was arrived at, particularly in light of the fact that the claimant did in fact receive £65,000 gross between July 2019 and March 2020.

39. I now turn to the bonus issue. The statement of main terms and conditions provides (at page 47) that the claimant's salary is £60,000 per annum. We can see that the statement of main terms and conditions of employment is in fact in template form. The figure of £60,000 is inserted in a different font and is clearly identifiable. There is then added below that clause the following:

    "A bonus of £10,000 to be paid at the end of the tax year (March 2020)." There are then some provisions for healthcare, car and computer and mobile telephone benefits.

40. As I have said, the claimant's evidence is that a salary of £70,000 was negotiated between him and Mr Nutter. The matters were arranged in this way to avoid upsetting the respondent's salary structure. The Tribunal did not have the benefit of hearing from Mr Nutter upon this (or indeed any other) issue.

41. Paragraph 56 of Mrs Nutter's printed witness statement read as follows:

    "Bonus – it was clearly agreed and understood between us and Mr Irish that any bonus set out in his contract of employment would only be payable if the business (at that point Acorn Scaffolding) was making profit in March 2020. In March 2020 Acorn was not making profit. All bonus arrangements with all employees ceased from March 2020. The impact of Covid on the events sector meant there was complete uncertainty over our revenue stream and profitability."

42. The printed witness statement was signed by Mrs Nutter on 31 August 2021. After she had taken the oath of affirmation, she said that before attesting as to the truth of her printed statement she wished to make changes to paragraph 56. The changes were to the effect that Acorn Scaffolding was making a profit in March 2020. Further, she added that there was an additional condition for bonus payment. This was that the claimant must secure multi-year contracts with the client that he said he would bring over to Acorn Scaffolding from Arena.

43. In their grounds of resistance, the respondent said (in paragraph 10) that, *"It was clearly agreed and understood that any bonus would only be payable if the business (at that point [Acorn] Scaffolding) was making profit in March 2020. In any event, in March 2020, the respondent was not making profit. All bonus arrangements with all employees ceased from March 2020".* This pleading is at odds with the evidence given by Mrs Nutter to the Tribunal that Acorn Scaffolding was making profit in March 2020. Further, no mention is made in the pleaded case of the additional condition (around multi-year contracts). Indeed, the respondent was unable to point to any reference to that condition anywhere within the bundle. Mr Rudd made good his point that the first mention of it was by Mrs Nutter upon the second day of the hearing when making her changes to paragraph 56. Further, Mrs Nutter was unable to give any specificity as to how many multi- year contracts the claimant was meant to bring across in order to achieve his bonus.

44. It was put to the claimant by Miss Ibbotson that he raised no issue about non-payment of the bonus until after he had given his notice of resignation on 11 November 2020. (The claimant was in fact summarily dismissed by the respondent during his notice period). The claimant tendered his resignation on 11 November 2020 (page 106). He gave three months' notice to bring his contract to an end. He therefore said that the last date of his employment would be 11 February 2021. Arising out of matters to which I shall shortly come, the claimant was suspended from work by the respondent on 12 November 2020 (page 107). The claimant protested against his suspension on 14 November 2020 (pages 108 and 109). There is no reference in that letter to the non-payment of bonus.

45. On 17 November 2020 the respondent's solicitor wrote to the claimant in reply to the claimant's letter of 14 November 2020. The claimant replied to that letter on 19 November 2020 (pages 236 to 238). In this letter, for the first time, the claimant asked about the bonus which he claimed was due to him the previous March.

46. The claimant maintained that he had verbally asked both Mr and Mrs Nutter about his bonus. I have no record that this was in fact put to Mrs Nutter during the course of her cross-examination.

47. The statement of main terms and conditions contains a clause that the respondent's chosen pension scheme is with the People's Pension. This is the pension scheme chosen by the respondent in order to meet the respondent's obligations to auto-enrol employees into a pension scheme pursuant to the Pensions Act 2008. The standard clause in the main terms and conditions says that the employee shall be automatically enrolled into the scheme after a three months' probationary period and the employee is required to contribute 3% of salary. The drafter of the statement of the main terms and conditions has then added the following, *"we as a company will contribute 5% into this or should you wish to use your own provider we will honour the same".*

48. The Employment Tribunal has no jurisdiction to deal with issues arising out of the operation of the statutory scheme under the 2008 Act. That is a matter for the First-Tier Tribunal. The claimant's complaint that the

respondent failed to pay the full amount of pension contributions due is brought before the Employment Tribunal as one of breach of contract.

49. It is not in dispute that the respondent did not pay anything at all into the pension between 1 July 2019 and 31 December 2019. The respondent then made some pension contributions for the period between 1 January 2020 and 23 November 2020. However, this was only at a rate of 2% and not 5% *per* the statement of main terms and conditions. The claimant therefore claims compensation for breach of contract in the sum of £1,500 for the former period and £1,080 for the latter period. (These figures are agreed subject to liability).

50. The bundle contains screenshots of WhatsApp messages involving the claimant and others from time-to-time. On 16 July 2020 (in a message sent at 06:33 at page 147) the claimant complains to Mr Pashley that the respondent was *"in breach of contract with my pension, medical insurance and bonuses in my contract."* Miss Ibbotson therefore put it to the claimant that he was well aware from July 2020 of the respondent's alleged breaches and yet did nothing about it at the time. The claimant attributed his failure to complain to an understanding that the benefits would be lost because of the administration of Acorn Scaffolding and the subsequent transfer of the employment to the respondent pursuant to TUPE. The claimant complained about the failure to pay the pension contributions in the letter of 19 November 2020 referred to in paragraph 45 above.

51. I now turn to events which ultimately led to the summary dismissal of the claimant, Mr Pashley and Mr Tilston.

52. It is worth setting out paragraphs 10 to 15 of the claimant's witness statement in full:

"(10) Once the first lockdown was announced on 23 March 2020, all work in the events industry stopped. The only meaningful work was in relation to temporary morgues which were needed due to the rising death rates. I managed to secure some of this work for the respondent through my contact at Losberger De Boer (De Boer) (see the quote at page 61 of the bundle). However, this did not appear to be enough to keep the respondent's business running and issues started to present themselves regarding the potential non-payment of employees' wages. For example, on a number of occasions we were told if we did not find buyers for the respondent's materials then there was a risk we would not be paid at the end of the month.

(11) The senior management team made the decision to make 41 members of staff redundant around May and June 2020 (which amounted to around 25% of the workforce) and place members of the office staff on furlough. I was placed on furlough from May 2020 and remained on furlough until my dismissal on 23 November 2020. Notwithstanding that I was nominally on furlough and that I understand claims were made to the Coronavirus Job Retention Scheme in that respect, the respondent required me to work full time and it topped up my wages to full pay.

(12) It was around this time that I knew that I would need to explore possible business opportunities away from the respondent for when, as appeared inevitable, the respondent fell into administration before the end

of 2020. I was also conscious of the considerable uncertainty in the economy.

(13) I therefore began to have discussions with other colleagues including Mr Pashley about what we could potentially do next in the event that the respondent did go into administration.

(14) I firmly believe that, given the difficult financial position the respondent was in and the uncertainty in the market caused by the Coronavirus pandemic, it was not unreasonable for me to consider possible options in the event of the respondent being wound up.

(15) I along with Mr Pashley, Darren Simpson (QHSE), Ross Tilston (operations manager), Gareth Garbett (construction manager) and (later) Gary Harrison (a carpenter not employed by the respondent) set up a WhatsApp group called New Formation on 11 May 2020 and some of the conversations about what would come next (after the respondent's anticipated insolvency) took place in this group (the WhatsApp messages can be found at pages 120 to 130 of the bundle). It is very clear from the WhatsApp conversations that we were all fairly certain that the respondent would go into administration and (and I still believe it would have done had the respondent not secured a £4 million government loan shortly after we left employment). We therefore considered it prudent to take some preparatory steps in relation to action we could take in that eventuality".

53. Mr Pashley gave evidence very much in the same vein. In paragraph 6 of his witness statement he said, *"… myself and the claimant did have discussions about what we may do in the event of the respondent going into administration. We felt that the "Acorn" brand had been tarnished by Scaffolding going into administration in December 2019. The literature (at pages 83 to 91 and 113 to 119 of the bundle) referred specifically to the formation of a new company under the Triton brand as we felt, once the respondent went into administration, clients would simply not trust the Acorn brand and the claimant since July 2020 had intermittent discussions with Graham Foxcroft, CEO of Triton Group Holdings Limited about a possible investment in a new business in the event that the respondent became insolvent. Whilst we took some preparatory steps towards being able to generate an income after the respondent became insolvent, at no point did the claimant or I divert any custom from the respondent."*

54. The literature to which Mr Pashley refers is described as a "*Triton Training Package Presentation"* dated July 2020 (pages 83 to 91) and *"Presentation re Tilton Structures and Power"* dated October 2020". These documents were upon Mr Pashley's laptop. The relevant screenshot demonstrating this is at page 356.

55. The July 2020 presentation has Mr Pashley as managing director. It shows the claimant as sales director and Mr Tilston as operations director. This document was authored by Mr Pashley. The document of October 2020 was authored by Mr Pashley and the claimant. The structure has changed as Mr Pashley and Mr Irish are shown jointly as directors upon the same salary. Mr Tilston appears in the structure in the same capacity as in the July 2020 document.

56. Although there was no satisfactory evidence that these documents were upon the claimant's laptop, the claimant acknowledged his authorship and knowledge of the document dated October 2020 commencing at page 113. I remind myself that from June 2020 the claimant had agreed to be placed upon furlough. Both of the documents referred to by Mr Pashley were produced after the claimant agreed to go on furlough.

57. The respondent had secured work with De Boer for the erection of temporary mortuary shelving. The relevant quote for this work dated 23 March 2020 is at page 61. This work was undertaken. It was done under the supervision of Mr Tilston.

58. It seems that this work was spread over five different sites. Mr Tilston project managed the work. He explained that because of the pandemic the respondent's stock was obviously not being used for events. Plainly, Mr Tilston saw the utilisation of the event stock for the provision of a temporary morgue facility as a good use of the respondent's resources.

59. This notwithstanding, Mr Tilston, the claimant and Mr Pashley were quite open in their evidence before the Tribunal that they harboured concerns about the respondent's viability, were looking to the future and were actively discussing their next move upon WhatsApp.

60. Mrs Nutter fairly acknowledged (in paragraph 27 of her witness statement) that the erection of the temporary mortuary during April 2020 (which work undertaken for Westminster City Council (in part) at a location known as Brakespears Road) came about because of the relationship that the claimant had with Mical De Boer. It appears from the same passage of her witness statement that Ross Tilston (amongst others) had been singled out for praise by Westminster City Council.

61. Mrs Nutter says in paragraph 21 of her witness statement that she after Mr Pashley and the claimant's dismissals she discovered a number of documents upon the claimant's laptop as well as that used by Mr Pashley. Mrs Nutter sent an email to her solicitor on 16 November 2020 (page 353) referring to documents recovered from *"their computers".* Amongst the documents she sent was the screenshot at page 356 to which I have already referred in paragraph 54. The screenshots are in fact only from Mr Pashley's computer and not from that used by the claimant.

62. The screenshot includes reference to a document entitled *"London Morgue Quotation".* This is dated 4 September 2020. The quote itself is at page 293 of the bundle. It is addressed to De Boer for the provision of 816 body shelves of certain dimensions at Breakspear and the subsequent hire of them for a 16 weeks' period.

63. The quotation was on the headed notepaper of Triton Project Solutions. This is the claimant's current employer. Mr Foxcroft said that he had had discussions with the claimant about the possibility of the claimant working for Triton in the future. These discussions took place in July 2020. Mr Foxcroft says that, *"Things only really began to take shape from my perspective once the claimant informed me that he had been dismissed in November 2020".*

64. Triton Project Solutions Limited was not in fact incorporated at Companies House until 3 November 2020. Mr Foxcroft's evidence is that TPS

commenced trading in March 2021 and the claimant was *"employed officially as business development manager from April 2021 once TPS officially started to trade."* Mr Foxcroft denied that the quote of 4 September 2020 emanated from him. He pointed out that stylistically he would always write the words *"kind regards"* with capitalised first letters and that he is the chief executive office of Triton and not the managing director as stated in the quote.

65. Mr Foxcroft says that TPS did quote for work with De Boer but not until January 2021. Mr Foxcroft explains in paragraph 9 of his witness statement that the background to this was that, "*the claimant came to see me in January 2021 to say a client has been in touch with him and there was a possible opportunity to install some scaffolding in some temporary morgues in London. He explained he would like to quote for this work and, with our financial and operational help, he would be able to service the contract. By this point he confirmed that his contractual issues regarding the respondent had been resolved."*

66. Mr Foxcroft goes on to say in paragraph 10 of his witness statement that, *"Myself and my business partner therefore agreed to help and we asked if the claimant could change his LinkedIn profile to reflect the fact that he worked for Triton as this would give clients more confidence in accepting the quote. The claimant successfully secured the contract and carried out the work under the Triton banner."*

67. Mr Tilston's evidence was that in or around November 2020, Westminster City Council was planning a permanent refit of the mortuary facilities in Brakespears. He said that this was unconnected with the temporary morgue work which had been done in March and April 2020. Mr Tilston says that he discussed the possibility of doing the permanent refurbishment work with Mr Nutter prior to his (Mr Tilston's) dismissal. Mr Tilston says that he discussed with Mr Nutter *"the best equipment to use. This was planned and not reactionary work."* The claimant gave a similar account of having received a call from Mr De Boer about the prospect of working upon the refurbishment of the morgue. The claimant said that he discussed this with Mr Nutter who did not wish to tie up materials in the hope that events would return. At this point (in the autumn of 2020) there was some prospect of some kind of normality returning. The claimant says that discussions with Mr De Boer around doing the planned morgue refurbishment work *"just fizzled out".*

68. Regrettably, by January 2021, there was a new wave of *Covid* cases. This chimes with paragraph 9 of Mr Foxcroft's evidence that the claimant discussed with him the possibility of Triton working to install scaffolding for some <u>temporary</u> morgues in London. (This was different work to the planned work contemplated in the autumn of 2020 which was discussed between Mr Tilston, the claimant and Mr Nutter).

69. The respondent became aware that Triton had quoted De Boer for the temporary morgue work in January 2021 when an email was mistakenly sent to the claimant's Acorn email address. It emerged in the cross-examination of Mrs Nutter that the respondent then prepared a quote addressed to De Boer. The respondent had failed to give disclosure of this document. This was disclosed to the Tribunal and to the claimant at

the conclusion of Mrs Nutter's evidence. The quotation is dated 15 January 2021. It was prepared by Neal Bowden of the respondent. In a covering email he refers to having provided an *"earlier quote."* (In the absence of evidence from Mr Bowden it is assumed that this is a reference to the work undertaken by the respondent for De Boer in March and April 2020).

70. There was no evidence that any work was undertaken by the claimant or TPS for the benefit of Westminster City Council upon the planned refurbishment work which had been mooted in November 2020. There was no evidence from anyone at De Boer to this effect.

71. Amongst the WhatsApp messages (within the bundle at page 111) are exchanges during the first week of September 2020. On 1 September 2020, the claimant asked Ross Tilston about the sizes of tubes in the morgue. Upon receipt of Mr Tilston's reply the claimant emphasised to him the need for confidentiality and that there *"might be some going back up at Brakespears November to end of March".* There are then exchanges on 4 and 7 September 2020 where the claimant informs others that *"Triton Project Solutions is born"* and that they had just quoted "*for our first job".* Mr Pashley chimed in to say, *"very good. Have a good week boys, every week is a closer week."*

72. The claimant, Mr Tilston and Mr Pashley denied that a quote had been sent to De Boer in September 2020. Their explanation for the quote's creation was that its purpose was to assuage Gary Harrison. Their evidence was consistent to the effect that he was becoming impatient and was keen to see meaningful progress. The claimant explained the emphasis upon confidentiality by reference to the need to avoid frightening the public with a detailed account of the need for temporary morgues and body shelves.

73. Some time was spent by each side seeking to impugn the other by reference to irregular features around the quote of 4 September 2020. In short, the claimant's case was that the quote had been fabricated by the respondent. The properties for the document are in the bundle at page 92. This appears to show the document being printed before it was created which is difficult to understand. The respondent maintained that the entry showing the last modification of the quote to have been undertaken by the claimant was genuine.

74. The claimant was summarily dismissed on 23 November 2020. The dismissal letter is at page 250. (The claimant had resigned upon three months' notice commencing upon 11 November 2020). The following reasons were given by Mrs Nutter for the summary dismissal of the claimant:

- *Starting to set up a competitive business, named Triton;*
- *Diverting, or attempting to divert, business away from Acorn to Triton;*
- *Actively encouraging other employees to join you in this new business adventure, namely Emma Petty, Ross Tilston, Darren Simpson and Gareth Garbett;*

- *Using company information and material and starting to set up this new business venture.*

75. There are a number of unsatisfactory aspects about the procedure carried out by the respondent when dismissing the claimant. In particular, a postponement request made by the claimant in order that he could be accompanied at the disciplinary hearing was refused. The claimant was denied an appeal hearing. His appeal was dealt with on the papers. The claimant was not shown documentation upon which for him to comment (in particular the quote of 4 September 2020). (These features would be relevant upon an unfair dismissal claim. However, the claimant had less than two years of service. Therefore, he has no right to complain of unfair dismissal).

76. The claimant's statement of main terms and conditions contains a non-solicitation clause in the following terms:

"You covenant with the company in that following the termination of your employment with the company, for a period of 12 months you will not carry out any business similar to or any business in connection with the company on your own behalf or on the behalf of any other persons, firm or company, directly or indirectly. This also applies to attempting to secure or obtain orders from or do business with any person, or company connected with the business. Additionally you shall not entice away from the company any employee who is employed by the company for 12 months after your termination date."

Discussion and conclusions

77. I now turn to my consideration of the relevant law, discussion and my conclusions. I shall start with a consideration of the unauthorised deduction from wages claim for the period between 1 and 23 November 2020.

78. It was suggested to Mrs Nutter by Mr Rudd that the respondent withheld payment of the claimant's wages for November 2020 because the respondent was annoyed with the way in which the claimant had conducted himself. This Mrs Nutter denied. She said that the wages had been withheld simply to recover the overpayment. However, Mrs Nutter said several times in evidence words to the effect that she felt no obligation to pay the claimant his November 2020 salary because he had been diverting work away from the respondent. Mrs Nutter said that she was *"floored"* by the discoveries that she made upon Mr Pashley's and the claimant's computers.

79. The Tribunal has sympathy with Mrs Nutter's position. For reasons I will come to, I find that the claimant did act in fundamental breach of his contract of employment with the respondent. However, that does not provide the employer with a defence to a claim by the employee for unpaid wages. Miss Ibbotson made clear in her submissions that no such case was advanced upon behalf of the respondent.

80. For the avoidance of doubt, an employer cannot avoid paying accrued wages even if there was a misconduct prior to the dismissal which justified summary termination. Authority for this proposition may be found in **Healey v Francaise Rubastacsa** [1917] 1 KB 936, where the employee

was held entitled to recover wages which fell due after he had committed a repudiatory breach but before his employer dismissed him.

81. As I said during the course of counsel's submissions, the principle was elucidated by Lord Atkin in **Bell v Lever Brothers Ltd** [1932] AC 161 where he said:

"If a man agrees to raise his butler's wages, must the butler disclose that two years ago he received a secret commission from the wine merchant; and if the master discovers it, can he without dismissal or after the servant has left avoid the agreement for the increase of salary and recover back the extra wages paid? If he gives his cook a months' wages in lieu of notice can he on discovering that the cook has been pilfering the tea and sugar claim the return of the month's' wages? I think not. He takes the risk. If he wishes to protect himself he can question his servant, and will then be protected by the truth or otherwise of the answers".

82. It follows therefore that the only defence which the respondent may have to the complaint from the claimant that he suffered an unauthorised deduction from his wages for November 2020 is if the respondent is able to succeed in establishing that an overpayment of wages was made. The statement of main terms and conditions of employment provides written authority for the recovery of an overpayment by way of deduction from the claimant's wages. (That said, the recovery of an overpayment is a permitted deduction even without such a provision by virtue of section 14(1) of the Employment Rights Act 1996).

83. The respondent's case is that the claimant was overpaid by £5,000. This is because the claimant received 13 months of salary during the tax year 2019/20 where he was only due to receive 12 months' salary given that he started work on 1 or 4 April 2019. The claimant's case is that he was paid the correct amount of salary during that tax year to reflect the fact that he had commenced work for the respondent (or more accurately Acorn Scaffolding) with effect from 4 March 2019.

84. On balance, upon this issue, I prefer the evidence of the claimant. Normally, an employee being on garden leave precludes them from working for another employer. Indeed, that is the purpose of garden leave – to keep the employee out of the workplace for a period of time. However, the circumstances here were somewhat unusual. Firstly, the claimant was working for the mutual benefit of Arena and Acorn Scaffolding who, it was anticipated, were going to work together upon the European Tour. Secondly, the claimant did undertake work for Acorn Scaffolding. Mrs Nutter accepted that the claimant came into the yard to manage the group of employees who had come from Arena with him. That is consistent with an agreement for the claimant to start work in March 2019 in order to be ready for the events being put on by the European Tour commencing in April 2019. It would not have served Acorn Scaffolding's purposes for the claimant to be out of action until April 2019 in the circumstances. Such would not have served Acorn Scaffolding's commercial interest.

85. Most persuasive of all is that the pattern of the claimant's payslips is entirely consistent with the claimant's version of events. Mrs Nutter sought to blame her payroll department for the situation. However, it is difficult to see how even the most incompetent payroll manager would on three

occasions (in January, February and March 2020) complete a wage slip with a bespoke item described as *'salary arrears.'* Further, there was no explanation from the respondent as to the rather precise figure in the P60 and in the March 2020 payslip. The provision of that figure is consistent with the claimant having started work part way through March 2019 otherwise one may have expected the figure in the P60 and in the March 2020 wage slip to be precisely £60,000 were the employment to have commenced on 1 April 2019 or just under £60,000 were he to have started on 4 April 2019.

86. In addition, Mrs Nutter appeared uncertain of the commencement date. There is an inconsistency between her witness statement on the one hand and the statement of main terms and conditions of employment on the other.

87. I am less persuaded by the claimant's point that it would be unusual to commence work on a Thursday as opposed to a Monday. I accept there to be a certain logic in commencing a new job on a Monday but starting a new role on another day of the week is certainly not unusual.

88. The claimant's explanation for the commencement dates given in the documents referred to in paragraphs 22 and 23 - that *'officially'* he could not commence working for Acorn Scaffolding until April 2019 because he was on garden leave- is plausible even if unsatisfactory given that he was on garden leave from Arena in March 2019 and that the work in March 2019 was an arrangement entered into with Acorn Scaffolding's sanction for their benefit and that of Arena. Thirteen months of salary payments in the tax year 2019/20 is consistent with such an agreement.

89. Therefore, on balance, I am satisfied that the claimant's commencement date was 4 March 2019. I am also satisfied that an arrangement was reached for him to be paid 13 months' salary during the course of the 2019/20 tax year for the same reasons. The cumulative figure in the March 2020 payslip and the 2019/20 tax year P60 of just short of £65,000 is entirely consistent with the claimant's version of events of having started work on 4 March 2019 (missing one working day of March, hence him not being paid precisely £65,000).

90. Additionally, there was no explanation from the respondent as to why it took from the end of March 2020 until around the time of the termination of the claimant's contract of employment for the overpayment of salary to be picked up and realised. Again, such is consistent with the claimant's account and inconsistent with that of the respondent who appeared to be content to leave matters undisturbed. In reality, in my judgment, it was Mrs Nutter's resolve not to pay the claimant for November 2020 given her outrage about his conduct that has led the respondent to an *ex post facto* attempt to justify withholding the November wages upon the premise of it being an overpayment which does not stand scrutiny.

91. Accordingly, my conclusion is that the claimant was paid the correct amount of salary (being 13 months' basic salary over a 12 months' period during tax year 2019/20). It follows therefore that there was no overpayment of salary and in so far as the respondent deducted the claimant's November 2020 wages by way of reimbursement such was an unauthorised and improper deduction. The wages properly payable to the

claimant for the period between 1 and 23 November 2020 were in the sum of £3,692.93. There was no overpayment to claw back. Accordingly, the claimant is entitled to be paid that sum by way of reimbursement of the unauthorised deduction.

92. I now turn to the bonus complaint. I agree with Miss Ibbotson that certain aspects of the claimant's case upon this are unsatisfactory. Notably, there was a conspicuous failure upon the part of the claimant to complain about the non-payment of bonus (or at any rate to complain about it in writing) until November 2020. This is somewhat surprising given the importance which the claimant attached to receiving a remuneration package in the sum of £70,000.

93. That said, the statement of main terms and conditions is clear. The statement evidences that the claimant had a contractual entitlement to be paid a bonus of £100,00 at the end of March 2020.

94. Effectively, the respondent's case is that this was a partly oral and partly written contract. Accordingly, evidence may be admitted upon the question of those parts of the contract not reduced to writing. Unfortunately for the respondent, little or no credibility could be attached to Mrs Nutter's evidence upon this issue. The wholesale change to paragraph 56 of her witness statement was fatal to the confidence which the Tribunal may have reposed in her evidence upon this point. Her evidence before the Tribunal flatly contradicted the pleaded case and the evidence in her printed witness statement that the respondent was not in profit in March 2020. Until she commenced giving her evidence, the respondent had maintained there to be no profit. Further, there was no mention anywhere of the second alleged condition to the effect that the bonus was conditional upon the claimant bringing clients across with him from Arena. This was mentioned for the first time only shortly after Mrs Nutter took the oath before the Tribunal when giving her evidence.

95. I find the claimant's account as to the origins of the agreement for the payment of remuneration to be credible. That finding is not impugned by the delay in the claimant pushing for the bonus. It is noteworthy that in the documents found upon Mr Pashley's computer (in particular, those at pages 113 to 119) the claimant had a salary expectation of £67,000 and then £70,000 in the two documents respectively. That corroborates the claimant's account of his salary aspirations. No rebuttal evidence was called by the respondent to the effect that their salary structure was anything other than that asserted by the claimant. The Tribunal did not have the benefit of hearing from Mr Nutter about the pre-contract negotiations.

96. I find, therefore, that the bonus was payable at the end of March 2020. The claimant's entitlement to bonus was unconditional.

97. Miss Ibbotson submitted that by his inaction the claimant had waived his bonus entitlement. In contract law, the word *'waiver'* is used in a variety of different senses and so bears different meanings. I take the relevant principle from *Chitty on Contracts* (33rd Edition) (at 24 - 007): *"Two types of waiver are relevant here. The first type may be called 'waiver by election' and waiver is here used to signify the 'abandonment of a right which arises by virtue of a party making an election.' Thus, it arises when*

a person is entitled to alternative rights inconsistent with one another and that person acts in a manner which is consistent only with his having chosen to rely on one of them. Affirmation is an example of such a waiver if an innocent party elects or chooses to exercise his right to treat the contract as continuing and thereby abandons his inconsistent right to treat the contract as repudiated. It is important to appreciate that, in this context, the party who makes the election only abandons his right to treat the contract as repudiated; he does not abandon his right to claim damages for the loss suffered as a result of the breach. A second type of waiver may be called 'waiver by estoppel' and it arises when the innocent party agrees with the party in default that he will not exercise his right to treat the contract as repudiated or so conducts himself as to lead the party in default to believe that he will not exercise that right. This type of waiver does not exist as a separate principle but is in fact an application of the principle of equitable estoppel …"

98. *Chitty* goes on to say in 24 – 008 that, *"Both waiver by election and waiver by estoppel share some common elements. The principle similarity is that both would appear to require that the party seeking to rely on it (ie the party in default) must show a clear and unequivocal representation, by words or conduct, by the other party that he will not exercise his strict legal rights to treat the contract as repudiated."* The passage goes on to say that, *"Waiver by estoppel requires that the party to whom the representation is made relies upon that representation so as to make it inequitable for the representor to go back upon his representation."*

99. I now turn to an application of these principles to the facts of this case. On my finding, the respondent was in repudiatory breach by not paying to the claimant his bonus at the end of March 2020. The claimant did not elect to treat the contract as at and end nor did he elect to exercise the inconsistent right open to him and say to the respondent words to the effect "*You are in breach of contract, however I'm going to continue to work under protest and reserve my right to pursue a claim for my bonus entitlement".* The claimant did nothing at all until November 2020.

100. As we have seen, the claimant did in fact resign his position, giving three months' notice on 11 November 2020. By his inaction from March 2020, and by giving contractual notice and not resigning summarily he had made an election to affirm the contract and waived his right to accept the respondent's repudiatory breach and treat the contract as at an end forthwith. This constitutes a waiver of the first type *per Chitty* at 24-007. However, waiving the right to resign summarily in response to the repudiatory breach does not prevent him from suing the respondent for the bonus.

101. It was no part of the respondent's case that the claimant had agreed to a variation of the contract so as to waive his bonus entitlement. Such would have required some consideration for this moving from the respondent to the claimant.

102. Therefore, respondent's only defence to the claim for the bonus is to bring themselves within the second type of waiver *per Chitty* at 24-008 - that is to say, that by his conduct there was a waiver by the claimant of his bonus entitlement such that it would be inequitable for him to recover it.

103. The respondent's case essentially boiled down to this: that by failing to take any steps or any significant steps between March and November 2020 the claimant has somehow waived his entitlement to bonus. The difficulty with this submission from the respondent's perspective is that there was no evidence of any unequivocal representation from the claimant that he was waiving his bonus. Indeed, there was no evidence that he did or said anything which may be so construed. Further, there was no evidence that the respondent had altered their position in reliance upon such a representation or that the circumstances were otherwise such as to make it inequitable for the claimant to go back upon his representation that he would waive his bonus entitlement.

104. The limitation period to pursue a breach of contract claim in the Employment Tribunal is three months from the date of termination of the contract of employment. In this civil courts, a much more generous limitation period of six years is provided by the Limitation Act 1980. Absent waiver by estoppel, there is simply no basis upon which it may be argued by the respondent that the claimant did not have six years from the end of March 2020 in which to pursue his claim for bonus in the civil courts. The respondent's submissions amounted to no more than the fact that a delay of several months during which the claimant took no effective steps to vindicate his rights somehow meant that he had lost them. Without more, simple inaction upon the part of the claimant cannot result in the loss of his rights.

105. For much the same reasons, the complaint that the respondent was in breach of contract by failing to pay the employer's pension contributions succeeds. Again, there was no suggestion of a variation of the terms provide that those payments would not be paid by the respondent. The claimant did not indicate an intention to *"stand and sue"*- that is to say, that he would work under protest and reserve his rights to pursue a claim in contract. He simply did nothing at all. He did not resign in response to the respondent's repudiatory breach in failing to pay him the correct remuneration. Again, there was simple inaction but without the creation of an estoppel of some kind such as to render it unconscionable for the claimant to seek to vindicate his rights. In any case, this was a recurring breach as for each month that went by the respondent repeated the breach (by either paying nothing at all or paying only part of what was due to be paid contractually).

106. I see nothing in the evidence (particularly in the statement of main terms and conditions) that made the employer's 5% contribution in some way conditional upon the payment by the employee of a contribution of 3%. Had there been a provision to that effect, one would have expected to see it in the statement of main terms and conditions. The evidence adduced by the respondent falls way short of satisfying the Tribunal that there was any conditionality upon the respondent's obligation to make payments into the pension scheme. There was no submission from the respondent (nor realistically could there be) that such a condition arose by necessary implication. A requirement for the claimant to pay his 3% first was not needed to give efficacy to the respondent's obligation to pay 5% into the pension scheme. There was no evidence that such conditionality arose by way of custom and practice in the dealings between the parties or in

the sector generally. The obligation of conditionality was not something so obvious as to arise by implication.

107. I now turn to the holiday pay claim. It appears not to be in dispute that the claimant had accrued more holiday than he had used as at the date of termination of the contract. The only issue that arises here therefore is whether the claim for holiday pay was liable to be extinguished by way of set off because of the overpayment of the claimant's salary. Because of the findings that I have made, it follows that the holiday pay claim must succeed.

108. This is a claim that arises by way of unauthorised deduction from wages under the 1996 Act. It may also arise under the Working Time Regulations 1998 by virtue of which a worker is entitled to compensation for holiday accrued but untaken at the date of termination. Either way, one arrives at the same result. The holiday claim therefore succeeds.

109. I now turn to the respondent's counterclaim. As I have said, I find that the claimant did act in breach of contract. In all contracts of employment, it will be presumed that the parties intend that the employee should serve the employer faithfully within the terms of the contract. There is therefore a term implied into all contracts of employment that the employee will render faithful service. This is sometimes known as the *'duty of fidelity.'* It should be mentioned that although all contracts of employment contain an implied duty of fidelity on the part of the employee, some positions – such as directorships – attract a more onerous '*fiduciary duty.'* This requires the employee to act only in the employer's interest and may even require him or her to report his or her own wrongdoing to the employer.

110. The claimant occupied a senior position within the respondent. His job title included the word *'director.'* He was not of course a statutory director for the purposes of the Companies Act 2006. I received no submissions to the effect that the claimant occupied a fiduciary position within the respondent. I shall therefore say nothing further upon this issue. Suffice it to say however that in any case even if the claimant did not occupy a fiduciary role, I have found him to be in breach of the duty of fidelity in any case.

111. The duty of fidelity (sometimes expressed as being a duty of good faith and loyalty) continues for as long as the employment contract subsists and imposes an obligation on the employee to provide honest, loyal and faithful service during employment. This means, amongst other things, that an employee must not compete with their employer and must not make preparations to compete with the employer during working hours. The implied duty of fidelity can be augmented by express terms. In this case, the statement of main terms and conditions did augment the implied duty by the provision of a non-solicitation clause.

112. The precise scope and content of the duty of fidelity is a question of fact which depends on the particular circumstances of the case.

113. Undertaking work for another during working hours or preparing to work for another during working hours will be a breach of the implied duty of fidelity. During the course of the hearing, I referred the parties to the case

of **Wessex Dairies Limited v Smith** [1935] 2 KB 80, CA as authority for this proposition.

114. Mr Rudd of course accepted this as a proposition but pointed out that at the material time of the alleged breach by the claimant he was relieved of the obligation to work for the respondent. This is because with effect from June 2020 the respondent utilised the Coronavirus Job Retention Scheme provided for by the government. The claimant agreed to be furloughed (as it is commonly known).

115. I agree with Mr Rudd that in these circumstances the employee is relieved of the obligation to work for the employer and indeed positively must not do so pursuant to the terms of the Scheme. All of the furloughed employee's time is therefore their own. Of course, there is nothing to prevent the employee while on furlough taking a job with another employer. Doing so during what would have been normal working hours for the furloughing employer will not therefore be a breach of the duty of fidelity. Mr Rudd fairly accepted however that, this notwithstanding, the other implied obligations of fidelity remain.

116. The implied duty of fidelity may prevent an employee from taking preparatory steps to compete with their employer once they have left employment. The extent of the duty will depend upon the facts of each case. Simply seeking employment with a competitor is not a sufficient reason to dismiss an employee unless it can be shown that there were reasonable grounds for supposing that the employee was seeking the alternative employment in order to abuse the employer's confidential information.

117. As I have said, the implied duty of fidelity will normally prevent employees who wish to compete with their employer once their employment has ended from taking preparatory steps towards that end during working hours. The corollary of that is that taking preparatory steps towards that end outside of working hours will not be a breach of the implied duty of fidelity. The waters are muddied here because of the claimant's participation in the furlough scheme as the evidence is that preparatory steps were taken during working hours while the claimant was furloughed. The London morgue quotation of 4 September 2020 was created at around 3 pm, during the claimant's working hours. The 'structure and power' documents of July and October 2020 were created at around 4.35 pm and 9.30 am respectively, again during working hours.

118. There are certain preparatory steps that an employee may be permitted to take outside working hours without breaching the implied duty of fidelity. For example, setting up an off the shelf company for competition purposes, arranging finance and premises, and ordering necessary equipment and materials will usually be permissible steps.

119. According to the *IDS Employment Law Handbook* on *Contracts of Employment* (at paragraph 8.10), "*It is likely that any use of an employer's computer or email system in making preparations to compete will breach the implied duty of fidelity".* Approaches made by employees to suppliers or customers may well be a breach of the implied duty of fidelity.

120. The boundary between mere preparatory activities which are permissible and actual competition which is not (during the currency of employment) is not an easy one to draw. From a summary of the relevant principles set out in *Tolley's Employment Law Handbook* (35th Edition) (at chapter 8.15) the following principles may be derived:

- It is indisputable that an employee owes his employer a contractual duty of fidelity, but how far it extends will depend on the facts of each case.
- The more senior the staff the greater the degree of loyalty, fidelity and diligence required.
- The court or tribunal must identify the nature of the employee's obligations of fidelity and then decide whether the employee's activities are in breach.
- The mere fact that activities are preparatory does not necessarily mean that they are legitimate.
- It is a breach of the duty of fidelity for an employee to recruit or solicit another employee to act in competition.
- Attempts by senior employees to solicit more junior staff constitutes particularly serious misconduct.
- It is a breach of the duty of fidelity for an employee to misuse confidential information belonging to the employer.
- The court or tribunal should ask whether the employee's activities affect their ability to serve their employer faithfully and honestly and to the best of their abilities.
- Mere preparations to set up a competing business after the termination of employment are not necessarily a breach of contract. The line between legitimate and illegitimate steps towards competing is difficult to draw. The line is crossed when the employee's acts are inconsistent with the duty of fidelity.

121. I also take into account that the implied duties were augmented by the terms set out in the statement of main terms and conditions. I cited the relevant clause in paragraph 74 above.

122. I find that Mr Pashley and the claimant sought to entice away from the respondent other employees including Mr Tilston. Mr Pashley and the claimant were the more senior employees. The general tenor of the WhatsApp messages is that they were the driving force behind the creation of the new business. I therefore find the respondent to have been in breach of the express obligation not to seek to entice away from the respondent any of their employees.

123. I also find the claimant to have been in breach of the implied duty of fidelity in several ways. Although there was no direct evidence that the claimant had used his own laptop for the purposes of preparing to compete, there is a strong inference that he did so. He readily accepted knowledge of the documents upon Mr Pashley's computer (in particular, the one dated October 2020 jointly authored by him). Therefore, I find it against the

probabilities that the claimant did not use his own laptop to undertake propriety steps. It is difficult to see how such action can be regarded as anything other than affecting the claimant's ability to serve the respondent faithfully and honestly and to the best of his abilities. I agree with Mr Rudd that these preparations are not a breach of the implied term because they ere done in normal working hours as the claimant was on furlough leave. However, that cannot detract from the fact that claimant was using the respondent's equipment (namely, the laptop provided for him by the respondent) in order to prepare to compete with them. These actions cross the line and are inconsistent with the duty of fidelity.

124. I am not satisfied on balance that the claimant sought to entice De Boer away from the respondent and into the hands of Triton in September 2020. There was no evidence that the quotation of 4 September 2020 was ever received by De Boer or that any work was generated from it. I agree with Miss Ibbotson that the claimant's explanation (and that of Mr Pashley and Mr Tilston) that the quotation was created to placate Mr Harrison was less than satisfactory. If anything, this was only storing up problems for later as Mr Harrison would surely realise before long that the hoped-for work was not materialising.

125. Nevertheless, however unsatisfactory an explanation this may be, the fact remains that there was simply no evidence that the quote created on 4 September 2020 was sent to De Boer or resulted in the placing of planned mortuary refurbishment work with Triton. I also found persuasive Mr Foxcroft's evidence that the quotation had not been created by him. Further, there is much in Mr Tilston's point that Triton was not in a position to service the contract for planned mortuary refurbishment in any case at that time.

126. There is no evidence that TPS (and the claimant in particular) solicited De Boer in January 2021. The claimant had known Mr De Boer for a long time.

127. Notwithstanding my rejection of the respondent's case upon the issue of the 4 September 2020 quote and the January 2021 work, I have found, as I have said, the claimant to have acted in fundamental breach of his contract of employment principally by his enticement away from the respondent of members of the respondent's staff and using the respondent's equipment when planning to compete with them.

128. I have of course found that the respondent were themselves in repudiatory breach of contract by failing to pay to the claimant his bonus payment at the end of March 2020 and the pension payments (which was a repudiatory breach throughout the employment). These are repudiatory breaches as payment of contractually agreed remuneration lies at the heart of the wage-work bargain. Does the fact that the respondent was in prior and subsequent repudiatory breach afford the claimant a defence for his own subsequent repudiatory breaches?

129. I received no submissions from either counsel upon this point. It is, however, uncontroversial (I think) to advance as a proposition that the contract remains *in situ* whatever the conduct of the parties until one or the

other accepts the other's repudiation of it. In the well-known words of Asquith LJ in **Howard v Pickford Tool Limited** [1951] 1 KB 417, an unaccepted repudiation is *"a thing writ in water and of no value to anybody."*

130. It follows, therefore, that notwithstanding that the respondent was (on my findings) in fundamental breach of the claimant's contract prior to the claimant's formation of the WhatsApp group in May 2020 and the claimant's actions to compete against the respondent, this does not exonerate the claimant of the consequences of my finding that he himself was then in subsequent repudiatory breach of contract. Here, the respondent did accept the claimant's repudiatory breach by summarily terminating his contract of employment on 23 November 2020. The claimant could have, but did not, accept the respondent's earlier breaches, the contract remained *in situ* and the respondent was entitled to take the course which it did by summarily terminating the contract. (There is of course no wrongful dismissal claim by the claimant. Had one been raised, then it would have failed upon this basis).

131. In principle therefore the respondent is entitled to sue upon the claimant's breach and has done so by way of counterclaim in these proceedings. The question that arises, therefore, is to what remedy if any the respondent is entitled.

132. The measure of damages for breach of contract is to put the innocent party in the position that they would have been in had the contract been performed. Therefore, had the claimant complied with the express and implied terms of the employment contract what position would the respondent have been in?

133. The counterclaim centres upon the contentions set out in the pleaded case at paragraphs 16 to 18 of the grounds of resistance which I have cited in paragraph 10 above. The counterclaim must fail upon the facts. The work quoted for by Triton in January 2021 was in fact for different works to that which was available in September 2020. The work in September 2020 was for the planned refurbishment of mortuaries operated by Westminster City Council. The work quoted for by Triton in January 2021 was for the provision of temporary mortuary facilities to deal with the second Covid wave. The second wave did not manifest itself until after the claimant had left the respondent's employment.

134. Notwithstanding the discovery by the respondent of the need for Westminster City Council for planned refurbishment works upon the mortuary, the respondent did not tender for that work. The respondent found out about the need for the work in November 2020 at the latest after the departure of Mr Pashley and the claimant and them finding the 4 September 2020 quote upon their computers.

135. There was no evidence that the planned refurbishment of the mortuary works was even undertaken anyway. It is possible that the planned refurbishment was overtaken by the events of the Covid pandemic.

136. I agree with Miss Ibbotson that the prospects of the respondent obtaining the temporary morgue work which had resulted from the second wave of the Covid pandemic in January 2021 was remote. The quote was sent too late in the day. Notwithstanding the respondent's attempts (by submitting a quote) when they accidentally found out that Triton had bid for the work, that bid was unsuccessful. As Miss Ibbotson rightly said, it was probably too little and too late for the respondent to have any prospect of securing the work.

137. That notwithstanding, this does not avail the respondent. The pleaded case is for the loss of the planned mortuary work. There is simply no evidence that the claimant diverted that mortuary work away from the respondent. There is no evidence that the work was even undertaken by Westminster City Council. There can therefore be no loss as the work did not materialise (in January 2021 as pleaded or at all) and had the claimant not been in beach it would not have gone to the respondent anyway. The respondent did not put in for the work themselves when the opportunity arose in November 2020. Upon this basis, therefore, no loss arose from the claimant's fundamental breaches.

138. By January 2021, when the need for temporary morgue facilities arose, the claimant had left the respondent's employment. In having dealings with De Boer he was in breach of the express terms as set out in the statement of main terms and conditions. (It is unlikely that there was a breach of the implied duty of fidelity which survives only to the extent of protecting information that is deemed a 'trade secret'). The claimant knew of De Boer in any case and had a longstanding relationship with Mical De Boer. Approaching Mical De Boer for work can therefore only have been a breach of the express term.

139. The difficulty for the respondent is that the pleaded case rests upon the premise that the loss to the respondent was of the work for which the quotation was created in September 2020. The respondent has therefore not made out its pleaded case that the work the subject of the September 2020 quotation was in fact undertaken by Triton in January 2021. Triton undertook a different work altogether during that month. Upon that basis, therefore, the counterclaim must fail.

140. In conclusion, therefore, the claimant succeeds with his complaint. The counterclaim stands dismissed.

Employment Judge Brain

Date: 14 October 2021