Case No 2200487/2017

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EMPLOYMENT TRIBUNALS

Claimant
Respondents

Mr R Dreyfuss **AND** Rotary Watches Ltd

Heard at: London Central **On**: 28 July 2017

Before: Employment Judge Palca

Representation
For the Claimant: Mr A Solomon, of Counsel
For the Respondent: Mr T Kibling, of Counsel

JUDGMENT ON PRELIMINARY HEARING

1 Pursuant to Rule 37 of the Employment Tribunals Rules of Procedure part of the response to this claim shall be struck out on the basis that it has no reasonable prospect of success. The part of the response which is to be struck out is that part which relates to the Claimant's claims, each from the period December 2016 to June 2017 inclusive, of unlawful deductions from wages of £21,496.56 per month (salary) and £1,058.34 per month (car allowance).

2 Pursuant to Rule 21 of the Employment Tribunals Rules of Procedure, the Respondents are therefore ordered to pay the Claimant the sum of £157,884.30.

3 No orders are made pursuant to Rules 26 and 28 of the Employment Tribunal Rules of Procedure.

REASONS

Issues

1. The purpose of the Preliminary Hearing was for the Tribunal to determine the Claimant's application that the Response should be dismissed.
2.

Background

3. The Claimant has been employed by the Respondent since 1 January 1987. His final active role for the Respondent was as its Chairman and Chief Executive Officer. From January 2015 to November 2016, he was seconded to another company within the same group as the Respondent (Eterna). Under the terms of his contract, as amended, the Claimant was entitled to receive a monthly gross salary of £21,496.56 and a car allowance which amounted to £1,058.34. Towards the end of 2016, the Respondent alleged that the Claimant was in breach of duty by, in essence, arranging for the over-inflation of profits which would result in him receiving increased compensation pursuant to a consultancy agreement between Eterna and Girton Group Ltd, an off-shore company controlled by the Claimant. The Respondent has made no payments to the Claimant from December 2016 onward, claiming that it is entitled not to do so by virtue of Clause 6.4 of the Claimant's service agreement.

4. Clause 6.4 of the service agreement states:

> *"The (Claimant) hereby authorises the [Respondent] to deduct from the salary or any other sums owed to [the Claimant] including payment in lieu of notice any money owed to any Group Company by the [Claimant] including but not limited to any overpayment of salary or expenses or payment made to the [Claimant] by mistake or misrepresentation or default of the [Claimant] or otherwise and any debt owed by the [Claimant] to any Group Company*."

5. The matters set out above at paragraphs 2-3 are not in dispute between the parties.
6. On 13 March 2017, the Claimant submitted an ET1 with the Tribunal claiming, in addition to payment of unpaid salary of £21,496.56, £1058.34 monthly car allowance, £3,628.48 as a monthly payment in lieu of pension contributions, and various other un-quantified amounts relating to expenses and benefits.

7. In relation to the claims relating to pension, expenses and benefits, the Respondent denies the Claimant is contractually entitled to receive a contribution towards his pension and argues that payments in relation to expenses must be reasonably and properly incurred. It seems to the Tribunal that these matters require the examination of evidence before any conclusion can be reached in relation to them.

8. A full hearing in relation to this claim is due to take place on 13 December 2017. The Claimant has successfully applied to amend his claim to update it to include claims for deductions from wages from more recent months so that the claim, as amended, now takes into account unlawful deductions for the period from December 2016 to June 2017. On 4 July 2017, Employment Judge Lewzey ordered that the Claimant should serve one consolidated pleading in relation to all unauthorised deductions to the effective date of termination of his employment by 31 October 2017. Employment Judge Lewzey gave the Respondent leave to amend its response by 14 November 2017. Thus far, the Respondent has not sought leave to serve an amended pleading.

9. By letter to the Tribunal dated 17 May 2017, the Claimant's representatives invited the Tribunal to rule, pursuant to Rules 26 and 28 of the ET Rules, that it had no jurisdiction to consider those parts of the Respondent's defence which related to any claim in contract or relying on set off against a claim for unlawful deduction from wages brought by the Claimant. On 4 July 2017, Employment Judge Lewzey ordered a Preliminary Hearing to consider the Claimant's application to dismiss the defence of the Respondent under Rules 26 and 28 of the Employment Tribunals Rules of Procedure 2013. During the course of the hearing, the parties were proceeding in accordance with Employment Judge Lewzey's order. At the conclusion of the hearing, and having given an indication of which elements of the response the Judge thought had no reasonable prospect of success, and given the wording for Clauses 26 and 28, the Employment Judge proposed on her own initiative, and on the application of the Claimant, to consider, pursuant to Rule 37, making an order that all or part of the response should be stuck out on the basis that it had no reasonable prospect of success. The Respondent was given an opportunity to make representations on that point, and, in effect, relied on the argument made earlier on in the hearing.

Employment Tribunal Rules

10. Rule 37 of the ET Rules provides that at any stage of the proceedings either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on grounds including *(a) that it … has no reasonable prospect of success*. Rule 37(2) provides that a claim or response may not be struck out unless the party in question has been given a reasonable opportunity to make representations either in writing or, if requested by the party, at a hearing. Rule 37(3) provides that where a response is struck out the effect shall be as if no response had been presented as set out in Rule 21 of the ET Rules.

11. Rule 21 refers to the effect of non-presentation or rejection of the response. In those circumstances, an Employment Judge "*shall decide whether on the available material (which may include further information which the parties are required by a Judge to provide", a determination can properly be made of the claim or part of it. To the extent that a determination can be made, the Judge shall issue a Judgment accordingly. Otherwise a hearing shall be fixed before a Judge alone.*

12. Rule 26 of the Employment Tribunal Rules, requires Employment Judges to consider all of the documents held by the Tribunal in relation to the claim following receipt of the response to confirm whether there are any arguable complaints and defences and Rule 28 states that if the Employment Judge considers that the response to the claim or part of it has no reasonable prospect of success, it shall send notice to the parties setting out the Judge's view and the reasons for it and in effect making an order that unless satisfactory representations are received from the Respondent, the relevant part of the response shall be dismissed.

13. Rule 26(3) states that if representations are received they shall be considered by an Employment Judge who shall either permit the response to stand or fix a hearing for the purpose of deciding whether it should be permitted to do so. The application of Rule 28 would therefore of necessity involve another hearing similar in nature to the one which took place on 28 July 2017, and it was for this reason that the Tribunal turned to the provisions of Rule 37 and made no specific order pursuant to Rules 26 and 28.

Submissions

14. The parties agreed that the Employment Tribunal was entitled to make a decision on this issue, but there was no jurisdiction for an Employment Tribunal to hear any counterclaim following on from a claim for unlawful deductions from wages to Section 13 Employment Rights Act 1996, and that the Employment Tribunal had jurisdiction to construe the Claimant's service agreement. (The Respondent argued that this was a power yet not an obligation at this stage).

15. Both parties produced skeleton arguments. There was also an agreed bundle of documents. There was no witness evidence.

16. The Claimant's argument was that, although Clause 6.4 of the Claimant's service agreement authorised certain deductions from wages pursuant to Section 13(1)(b), that provision did not entitle the Respondent in effect to set off against wages an unquantified and unparticularised claim for damages for alleged breach of the Claimant's service agreement. As a result this was not a "debt". The Claimant's representative stated that any deduction legitimately made pursuant to Section 13 of the Employment Rights Act 1996 should be for a liquidated sum. It was also argued that the correct interpretation of Clause 6.4 of the service agreement entitled the employer to deduct from salary monies owed rather than a potential future claim for unliquidated damages.

17. So far as the claim for expenses was concerned the Claimant argued that they were due and either owing as wages or, because paid to third parties, could not be regarded as an unlawful deduction. No evidence was necessary in relation to that.

18. The Respondent argued that there was insufficient material before the Tribunal for it to be satisfied that there was no reasonable prospect of a successful defence of the claim, given that it must do so without hearing evidence, and bearing in mind the overriding objective. Given that the Respondent has the right to amend its response in November 2017, the pleadings were not closed and it would therefore be premature to make any strike out order. Evidence was certainly necessary in relation to the expenses claims, and construction of the contract might well depend upon other documents and evidence.

19. While the Respondent's primary argument was that a strike out was inappropriate in the present circumstances, in any event it relied on the provisions of Clause 6.4 as an adequate deduction clause even if the relevant sums were unquantified. Such cases as existed (for example **Delaney v Staples [1992] 1AC 687, HL,** and **Asif v Key People Ltd [2008] UK EAT 0264/07/703** could be distinguished because they were not about a contractual right to make deductions.

Conclusion

20. It has been agreed between the parties that the Respondent does not have a right or set off or counterclaim within the jurisdiction of Part II of the Employment Rights Act 1996. The issue before the Tribunal, therefore, is whether, reviewing the documents before it and without the need for any evidence, the Tribunal concludes that all or part of the response has no reasonable prospect of success.

21. The Tribunal determined to consider this issue pursuant to Rule 37 of the ET Rules, on the basis that the hurdle ("no reasonable prospect of success") in that rule was the same as in Rule 28, and it obviated the practical requirement that, if an order were made pursuant to Rule 28, there could possibly be the need for a further hearing which would in essence repeat the present hearing. The Claimant had suggested this route. The Respondent argued that, by acknowledging that it would not make any further submissions on the point at the hearing but would rely upon earlier submissions, it was not condoning the approach.

22. The Respondent relied upon no evidence save that which was uncontested in the claim and the response.

23. The Tribunal bore in mind that it must review whether, on the available material, a determination of the issues can be made on all or part of the Claim (Rule 21(2), ET Rules).

24. The Tribunal concluded that, while it was not obliged to interpret Clause 6.4 of the Claimant's service agreement, it was entitled to do so, and that the current hearing was an appropriate opportunity to do so. The clause entitled the Respondent to deduct from salary "any money owed to any Group Company by the Employee". Examples, which were not limited, were given

as overpayment of salary or expenses, a payment made to the employee by mistake or misrepresentation or default or otherwise, and any debt owed by the employee to any Group Company. In the judgment of the Employment Tribunal, this wording is clear and unambiguous, and does not encompass unquantified claims in relation to which no judgment or order has been given and no agreement reached; it applies only to money owed, and debt. It is the Respondent's case that it has withheld money because it believes that it is entitled to damages for the Claimant's alleged breaches of his service agreement. The Tribunal considered that if such sums to be legitimately deducted within the terms of the contract, there must be a judgment or agreement that they are owing (neither of which circumstances exist at present).

25. The Tribunal therefore believes that the element of the response which relates to the two elements of the claim which are uncontested, namely the Claimant's salary of £21,496.56 per month and his car allowance of £1,058.34 per month have no reasonable prospect of success. There was sufficient available material for a determination to be made in relation to this part of the claim and judgment, as set out at the heading of this decision, is issued accordingly.

26. While the principal in relation to the Claimant's pension payments and expenses is the same as that set out above, the Respondent makes certain arguments as to whether or not the expenses are reasonable and appropriate, and whether or not the pension payment would necessarily continue to be made throughout the period to the end of the service agreement, in relation to which the Tribunal felt that further evidence was necessary. These elements of the claim, therefore, will continue to a full hearing.

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Employment Judge Palca

Dated: …28 September 2017