EMPLOYMENT TRIBUNALS

Claimant **Respondent**

Mrs L Guerreiro **v** **Legal Comfort Associates Ltd**

Heard at: Cambridge **On:** 12 February 2018

Before: Employment Judge Michell

Appearances:
For the Claimant: In person
For the Respondent: Mr K Jalib, HR Manager

JUDGMENT having been sent to the parties on 22 February 2018 and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013, the following reasons are provided:

REASONS

Background

1. By an ET received by the tribunal on 23 November 2017, the claimant brings a claim of unlawful deduction of wages and holiday pay claim following her resignation on 26 September 2017.

The hearing

2. This case was listed for only one hour. Neither party told the tribunal that more time was required. Fortunately, the tribunal had the afternoon in which to deal with the case. I heard evidence from the claimant and from Mr Jalib, HR Manager and legal adviser to the respondent.

Legal framework

3. Pursuant to s.13 of the Employment Rights Act an employer is prohibited for making deductions from a worker's wages, save in certain prescribed circumstances (none of which apply here). Pursuant to regulation 14 of the Working Time Regulations a worker is entitled to payment in lieu of untaken holiday according to the formula set out in that regulation.

4.

Factual findings

5. The claimant started work for the respondent, a limited company providing legal services, on 30 May 2017. She was employed as a papa legal. In the context of the interview process the respondent indicated that the claimant

would be expected to generate work for the company; that much is uncontentious.

6. The claimant countersigned a job offer letter on 25 April 2017. It provides that she will be paid a salary of £1,500 gross per calendar month. The letter also says, at numbered clause 3:

> "It has been agreed that the first few months (up to six months) you will need time to build your practice. After six months you will be expected to generate income that equates to approximately six times your salary."

7. The claimant was in due course provided with a contract of employment, it is dated 5 July 2017. That contract provides, at clause 5, for a £1,500 per calendar month salary. There is no provision to the effect that salary would only be payable if a certain amount of work had been generated by the claimant. The contract does not contain any authorisation for the respondent to make any deductions to that salary.

8. The claimant was paid on 1 July 2017 the full £1,090.52 due to her, net, for each month. However, on the following month, although the respondent issued a pay slip for the full amount (I am told, in error) she was only paid £600, on 30 August 2017. She was later paid a further £500, on 7 September 2017. These were the last amounts she received. Again, she was provided with pay slips for the full amounts for the following months, again, I am told this was in error. On 17 August 2017 the claimant met with Mr Jalib. He impressed upon her the company's requirement for her to produce at least six times her salary in the value of work. His email of 18 August 2017 confirms as much. However, that email does not say that unless until the claimant generated that much work, or any other specified amount of work, she would not be paid any salary at all. The claimant tells me and I accept that if the respondent had sought to impose that kind of restriction upon her, she would have resigned in response. Perhaps such a response would be unsurprising. Indeed, Mr Jalib in his submissions said he would never tolerate such a condition being posed upon him.

9. On 6 September and on 19 September the claimant wrote to Mr Javid Patel setting out the monies overdue to her for July and August. Mr Patel's response on 19 September 2017, was to say, amongst other things, as follows:

> "Dear Lucy,
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> I appreciate your email and support. I also see your trying your best to bring services to the local community. I am also waiting for few payments from my clients whom I have sent invoices. As soon as I will have some funds with me I will pay the balance to you. Currently fees are only earnt on my files rest or process is really slow and as I have indicated if everyone secured their clients and income this way we would not rely on each other [sic]."

10. So, Mr Patel is promising the claimant payment in respect of salaries overdue to her. Strikingly, Mr Patel did not make any of the assertions made in the Grounds of Resistance about the claimant's alleged self-employment since 1 August 2017, her alleged serious work deficiencies, or the respondent's non-liability to pay any monies due unless and until the

claimant generated certain amounts of work.

11. The full amount was still not forthcoming. Thus, the claimant writes again on 25 September 2017, explaining that the situation could not continue. Mr Jalib's response by email was assertive. Amongst other things, he said as follows:

> "May I remind you again that as a fee earner you have to earn your own salary and the payment of your salary is to be made from the income you would generate. This has always been a condition of your employment and you are very well aware of it… If you believe that we cannot afford your pay then we suggest the decision is yours. Your salary is and always has been conditional to the income you generate… Trust me no one is forcing you to leave… as your employer we could only ignore the failure to achieve the financial target for a short time…."

12. The response by Mr Jalib ties in with the claimant's assertion that she was told on 25 September that she had to "earn my own salary", which assertion under cover of a 17 January 2018 costs warning the respondent describes as "lies". Of course, Mr Jalib's assertion does not accord with what the contract says nor does it accord with the content of a job offer letter. Even if (which I reject) the job offer letter means that after six months the respondent was entitled to pay or not pay the claimant's salary purely by refence to the revenue she generated, she was still well within the first six months of her employment. I also accept the claimant's evidence that she was never told prior to 25 September, that she would not be paid any salary unless and until she generated certain amounts of money.

13. The claimant accordingly resigned, under cover of an email dated 26 September 2017. She ends that email by saying:

> "Unfortunately, I cannot work on the condition of only being paid if I generate my salary. I suggest you to clarify to your future staff that this is the condition and stress it as an explicit term in t heir employment contract."

14. The claimant was not paid any holiday monies in lieu of her departure. She took a total of 45.5 hours' worth of holiday during her time at the respondent.

15. In its ET3, and in evidence via Mr Jalib, the respondent attempted to say that the claimant somehow became self-employed on or about 1 August 2017 and that somehow the terms of her contract ceased to apply. I wholly reject that assertion which seems to me to be entirely misplaced. From the evidence I have heard the claimant carried on performing essentially the same role on essentially the same terms throughout her employment. The simple alleged assertion that the claimant told the respondent on 17 August 2017 that "We should not control her" by pushing her to generate work cannot, even if factually correct, somehow render her "self-employed". The respondent's case on point is also perhaps further undermined by the respondent's own assertion that the claimant breached the terms of her notice under the contract – which assertion depends upon the continuation of the contract, rather than a complete rewriting of it.

16. The respondent complains at paragraph 7 of its defence, that the claimant "stubbornly expressed that she wanted her salary regardless of how she

performed". Of course, if the claimant failed to do her job, or generate the work the respondent expected of her, the respondent had the option of dismissing her. This was particularly simple to do during her probationary period. Until then, however, it was obliged to pay her the salary it had agreed to pay her.

17. It is regrettable that a solicitor's business would defend the claim on such a misplaced basis and pepper its defence with allegations about (for example) the claimant's "poor immigration history", "lies" which were not put

18. to the claimant in any event and do not appear to have stopped the respondent from hiring the claimant, for continuing to employ her until her resignation.

19. I should also mention something about the conduct of this litigation. The respondent's 17 January 2018 costs warning letter makes various threats and assertions which do little or nothing to answer the claimant's case. The respondent's 26 January 2018 application to strike out the claim on the basis the claimant had failed to set out in writing the remedy sought pursuant to the Employment Tribunal's directions was, at best, optimistic. Although the claimant was indeed told to provide those details, it is not hard to see from the ET1 what she seeks, and why. Strike out would plainly not have been appropriate as the respondent ought to have appreciated. A better course, and one more in keeping with the overriding object9ive, would have been to seek any necessary clarity from the claimant, as well perhaps as agreeing directions with her as regards to exchange of paperwork etc at the same time.

Contract claim

20. The respondent brings a contract claim for £2,576. £800 of that sum is said to be "loss of professional fee" on the basis that it lost a client because the claimant told the client, whom she had introduced to the respondent, that she had resigned. The respondent claims at paragraph 12 of the Grounds of Resistance this was in breach of Clause 6 of her contract of employment, which it is (wrongly) said prohibits the claimant from "exchanging cases or referring clients to other law firms or third parties". I was presented with no evidence to support that £800 claim, as it was not put to the claimant. I reject it.

21. The respondent also claims "extra salary" for three weeks "travel/fuel" and "parking". See page 4 of the defence and page 9. The claim amounts to £1,776. I reject the claim for these reasons:

    20.1 The defence says that the money is due to be paid. I have seen no prof and have heard no evidence that the money has been, or will in fact be paid.

    20.2 No evidence has been given that the (un-named) paralegal was in fact required to do work at Hadley or that such work was required in order for the respondent to mitigate its loss.

20.3 In any event, in circumstances where the respondent had committed the repudiatory breach of failing to pay the claimant her salary over a period of some months, the claimant was fully entitled to terminate her contract without giving the requisite four weeks' notice. Further to this I also find it cannot possibly be right for the respondent is entitled to avoid a finding of repudiatory breach by relying on the "variation to contract" term at clause 19 of the contract. That clause cannot, in my judgment, be used to rewrite the claimant's terms of remuneration in such a fundamental way. Moreover, there was in any event, no "period of consultation", or application of a "reasonableness" test as envisaged by clause 19 of the contract. The respondent should perhaps count itself fortunate the claimant has not sought to claim compensation for her "loss" notice period.

Conclusions

21 The respondent has unlawfully deducted the sum of £2,346.62 from wages due to the claimant contrary to s.13 of the Employment Rights Act.

22 The respondent has failed to pay the claimant the sum of £13.01 as untaken holiday pay owed to her pursuant to Regulation 14 of the Working Time Regulations 1998.

23 The contract claim is dismissed.

NOTE:

The above figures have been agreed by the parties subject of course to the question of liability.

I also explained to the parties the process by which written reasons can be sought.

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Employment Judge Michell

Date: 13 March 2018……

Judgment sent to the parties on

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For the Tribunal office