



EMPLOYMENT TRIBUNALS

Claimant

Respondents

Mrs SM van Hinsbergh

v

**(1) Lilies And Lions Limited
(2) Bambizi Limited**

Heard at: Norwich

On: 20 December 2017
27 March 2018 (In Chambers)

Before: Employment Judge Postle

Appearances

For the Claimant: Mr Gilley, Counsel.

For the Respondents: Mr Varnam, Counsel.

RESERVED JUDGMENT

1. The claimant's pay per month was £2,303.93.
2. The claimant suffered unlawful deduction of wages for the period 1 November 2016 to 10 November 2017 and the first and second respondents are jointly and severally liable to pay to the claimant the total sum of £9,001.32 (such sum includes failure to pay statutory sick pay).
3. The first and second respondents are jointly and severally liable to pay to the claimant bank charges incurred as a result of the non-payment of wages in the sum of £274.50.
4. For failure to provide written statement of terms and conditions the first and second respondents are jointly and severally liable and are ordered to pay to the claimant two weeks wages in the sum of £978.

RESERVED REASONS

1. The claims were listed for a one-day hearing on evidence only which was concluded on 20 December 2017. It was agreed with the parties' respective Counsels that written submissions would be submitted to the Tribunal in January 2018, those submissions ultimately reached Employment Judge Postle towards the end of January 2018 through no fault of the parties' representatives.
2. In the claimant's ET1 originally against the first respondent filed on 8 August 2017 the claimant made claims for, unlawful deduction from wages under s.13 of the Employment Rights Act 1996 particularly, deductions in salary from November 2016 to May 2017, and failure to pay statutory sick pay. There was also a claim for failure to provide written terms of employment contrary to the Employment Rights Act 1996.
3. The first respondent filed their defence on 12 October 2017 denying the claims and asserting that the claimant was employed by Bambizi Limited. As a result of this the claimant's solicitors were granted an order to add an additional respondent Bambizi Limited and ultimately a response was filed by that company literally days before the full merits hearing.
4. There was a discussion at the outset of hearing as to the status of the first respondent, particularly whether it was in administration or liquidation. If it were in administration clearly the written consent would be required of the administrator to continue with those proceedings. A short adjournment was granted, and Mr Varnam spoke to the liquidator who confirmed that the company has been placed in liquidation and therefore no consent was required. That was agreed by all parties.
5. In the tribunal we heard evidence from the claimant through a prepared witness statement.
6. For the respondents, Mrs Sarah Matthews who was a director of the first and second respondents.
7. The tribunal also had the benefit of a bundle of documents consisting of 135 pages.
8. The tribunal also has the benefit of detailed written submissions on behalf of the claimant's Counsel running to some 18 pages, also the written submissions on behalf of the second respondent's Counsel running to some 23 pages.

Findings of fact

9. The case really comes down to who was the correct identity of the claimant's employer. The facts of this case appear to show that the claimant commenced her employment with Mrs Matthews as a sales manager working for the second respondent in April 2016. The second respondent was a company designing and selling nursery furniture which had two lines; 'Bambizi' and 'Lilies And Lions'. For reasons best known to Mrs Matthews in the summer of 2016 she decided to separate the second respondent Lilies And Lions brand and incorporate a new company known as Lilies And Lions.
10. At the commencement of the claimant's employment with the second respondent, Bambizi Limited in April 2016 it appears it was agreed that she would be paid £28,000 per annum. The claimant would send her expenses into Mrs Matthews. 20 days holiday plus the usual bank holidays appears to have been agreed. There were no set working hours but the claimant's job would require 40 hours a week and would be home based. The claimant was mainly responsible for Bambizi's business operations and customer services. The claimant had no involvement in the financial aspects of the business. The claimant requested a written contract of employment on a number of occasions, but this was not forthcoming either from the first respondent or the second respondent.
11. It was in or about July 2016 when Mrs Matthews mentioned to the claimant that she was looking for an investor in the new company she wanted to set up or had recently set up. Mrs Matthews had explained that the new company would manufacture baby furniture and accessories, and it was to be called Lilies And Lions Limited.
12. In early August 2016 the claimant discussed with Mrs Matthews the possibility of both her father and herself investing in the first respondent, Lilies And Lions Limited. Mrs Matthews, the claimant's father and the claimant agreed that the claimant would invest £100,000 in return for 15% of the shares in the first respondent, whilst the claimant's father would invest £50,000 in return for 5% of the shares in the first respondent. It was also the understanding of the claimant and her father that they would be appointed statutory directors in Lilies And Lions Limited. Mrs Matthews already being a director in Lilies And Lions Limited.
13. It was further agreed between the claimant and Mrs Matthews that as the claimant was investing in Lilies And Lions Limited, the claimant would be appointed sales director and would be undertaking work for both the first respondent and the second respondent. Thereafter the claimant continued to undertake work for both the first and second respondents, dependant on whether the orders were for bespoke products or manufactured products. The claimant was also responsible for booking trade shows, logistics and customer services for both companies. The claimant also had the authority given her position in Lilies And Lions Limited to find and incur expenditure on behalf of that company, as

evidenced by a lease agreement from a motor vehicle hirer signed by the claimant on behalf of Lilies And Lions Limited (page 113C). It would appear the claimant carried on functions working for both the first and second respondents. It was also agreed with Mrs Matthews with the claimant's new position she would receive a salary of £36,000 per annum as sales director.

14. The final investment of the claimant and her father seems to have taken place around 18 August 2016, initially £42,508 in Lilies And Lions Limited (page 43) and then a further investment in the first respondent also in August 2016. The total investment made by the claimant was £78,000 to purchase 10 shares in the first respondent. The claimant's father invested £52,500 in return for 7 shares in the first respondent.
15. On 3 August 2016 the claimant received a payment of £1,850.60 from the second respondent as payment of arrears of July's salary.
16. On 1 September 2016 the claimant received a payment of £2,303.93 as payment in arrears of her August monthly salary (page 47).
17. The claimant received a further monthly payment of £2,330.93 on 30 September 2016 again in arrears of her September salary (page 46).
18. On 31 October 2016 the claimant received a monthly payment of £2,303.93 in arrears of October's monthly salary (page 46).
19. Apparently, the monthly salary was not paid on a specific day and the claimant would often have to remind Mrs Matthews to make salary payments.
20. On 30 November 2016 the claimant noticed that she had only received a payment of £1,737.27 in arrears for her November salary (page 45). That represented a shortfall of £566.66. The claimant phoned Mrs Matthews and asked for an explanation. The claimant was informed by Mrs Matthews that having spoken to the respondent's bookkeeper they had advised her to reduce the claimant's monthly salary. The claimant did not agree to this reduction in salary.
21. On 30 December 2016 the claimant received a monthly salary payment of £1,623.93 (page 45). Again, the claimant spoke to Mrs Matthews and questioned the shortfall in her wages. The claimant received a second payment of £113.24 on 4 January 2017 (page 45). However, the claimant had still been under paid by £566.66.
22. The claimant and her father became concerned towards the end of January 2017 when Mrs Matthews' partner Mr Hollier had previously been convicted for fraudulent trading (page 78-82). Following an email from Mrs Matthews on 23 January 2017 in which she indicated that Mr Hollier would be putting together a sales strategy for Lilies And Lions Limited (page 30).

23. On 1 February 2017 the claimant received a payment of £1,737.27 in respect of January's salary (page 45). Again, there was a shortfall of £566.66.
24. On 28 February 2017 the claimant received two separate payments of £1,000 and £737.27 in respect of February's salary (page 45). The claimant phoned Mrs Matthews and asked for an explanation about the shortfall in her wages. The claimant was told a further repayment would be made. However, there was still a shortfall in the monthly salary payment of £566.66.
25. The document disclosed by the respondents at page 74B refers to a transaction referenced 'SM Van Hinsbergh wages' on 28 February 2017 showing a payment of £1,737.27. The claimant says the payment was never received (pages 44-45).
26. On 8 March 2017 the claimant and her father attended a meeting with the shareholders of the first respondent, at the respondents' accountants in Coventry (pages 87-88). At that meeting the claimant and her father requested financial information regarding the first respondent. Particularly the claimant had not received any written employment contract, or any payslips itemising her pay. Furthermore, the claimant raised the fact that she had not been paid any business expenses since joining.
27. Following the meeting with the accountant the claimant and her father jointly wrote to Mrs Matthews on 21 March 2017, formally requesting financial information about the first respondent (page 83-86).
28. Although salary payments into the claimant's bank account were referenced as "Lilies Lions wages" when the claimant received copies of itemised payslips for the period 30 April 2016 to 28 February 2017 these referred to payments being made by Bambizi Limited (page 37-42). Further the itemised payslip appeared to be incorrect as they referred to different salary payments for the months of August, September and October than the amounts the claimant actually received (pages 37-42). By an email of 21 March 2017, the claimant asked Mrs Matthews to explain why the payslips referred to Bambizi Limited and not the first respondent. Mrs Matthews did not respond to that request or provide any explanation about the payslips.
29. Following the shareholders meeting on 8 March 2017 the claimant was locked out of her email account by Mrs Matthews. That made it difficult for the claimant to perform her duties. Mrs Matthews then wrote to the claimant on 13 March 2017 asserting that she was receiving complaints from customers about not taking/returning calls from customers (page 94B). The claimant spoke to Mrs Matthews to allay her fears. Without access to the email account or the respondent's software the claimant experienced difficulties in performing her role.

30. The claimant was paid no salary from the month of April 2017 onwards, and in May 2017 the claimant was signed off sick with work related stress, and despite sending her sick notes to Mrs Matthews the claimant received no statutory sick pay. Ultimately the claimant resigned from her post in November 2017 as clearly the situation had deteriorated and the claimant had been effectively cut out of the business.

The Law

Unlawful deduction of wages

31. S.13(1) of the Employment Rights Act 1996 states that:

- “(1) An employer shall not make a deduction from wages of a worker employed by him unless—
- (a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker’s contract, or
 - (b) the worker has previously signified in writing his agreement or consent to the making of the deduction.”

32. S.27(1) of the Employment Rights Act 1996 defines “wages” as “any sums payable to the worker in connection with his employment”. This includes “any fee, bonus, commission, holiday pay or other emolument referable to his employment, whether payable under his contract or otherwise”.

33. It is true there is no valid distinction to be drawn between a deduction from wages and a reduction in wages. The issue is simply whether the worker receives less than the amount properly payable to him or her.

34. Wages will be “properly payable” where there is some legal but not necessarily contractual entitlement to the sum in question.

Statutory sick pay

35. Where the employer has not decided on a time limit, notice of any day of incapacity for work shall be given by or on behalf of an employee to his employer on or before the seventh day after that day of incapacity for work, and shall be in writing unless otherwise agreed. If the employee fails to notify the employer within the relevant time frame and the employer does not accept that there was a good reason for the delay the employer is entitled to withhold payment of statutory sick pay for the duration of the delay – S.156(2) of the Social Security Contributions and Benefits Act 1992.

Credibility

36. It is true this case revolves around various undocumented agreements between the claimant and Mrs Matthews. The Tribunal finds the claimant's answers true, clear, reasonable, relevant and on balance more believable than that of Mrs Matthews. The claimant's recollection of events was detailed and consistent, and she was able to provide details of her meeting with Mrs Matthews in August 2016.
37. Whereas Mrs Matthews evidence was quite simply like shifting sand and she clearly found the truth an alien concept. Mrs Matthews' evidence lacked any consistency, she frequently evaded answering questions or tended to give an answer to a question which was not relevant to the question being asked. On a number of occasions, the same question had to be repeated in order to get Mrs Matthews pinned down with an answer to that question.
38. Some of Mrs Matthews evidence was of particular concern, in particular Mrs Matthews had disclosed a letter of 23 April 2017 inviting or purporting to invite the claimant to a disciplinary hearing scheduled for the 28 April 2017 (page 100A). It was put to Mrs Mathews in cross examination that this letter was fabricated after the 28 April 2017 and in fact had never been sent to the claimant. Mrs Matthews only response was to say that she took advice from a solicitor to follow correct procedure. Further, it was clearly put to Mrs Matthews that she did not send any follow-up correspondence to the claimant following the claimant failing to attend the alleged disciplinary hearing scheduled for 28 April. Mrs Matthews simply said she had "emails", when asked to identify such emails she simply said she did not know where they were. Mrs Matthews was unable to identify any such emails in the bundle or give an explanation as to where they were.
39. Furthermore, Mrs Matthews was inconsistent and contradicted her own evidence regarding blocking the claimant's access to emails and the respondents' computer system. In addition, Mrs Matthews eventually conceded the reason for ceasing enhanced salary payments to the claimant had changed throughout documents in the bundle, her pleaded case and her witness statement. Mrs Matthews accepted that she had fallen out with the claimant and her father when they made complaints about the first respondent's finances.
40. Further, Mrs Matthews' oral evidence was simply unsupported by the documentary evidence in the bundle, particularly she was unable to offer any explanation as to why the claimant's payslips were incorrect or unable to point to any evidence substantiating her assertion that the claimant was paid from Lilies And Lions Limited's bank account. Mrs Matthews even suggested at one stage she thought the claimant had left her employment in April 2017 despite allegedly sending emails to the claimant inviting her to staff meetings during April 2017.

Conclusions

41. This is a case where it is agreed there was no written contract of employment between the claimant and either the first or second respondent in place at any time. Was in fact the claimant employed by both respondents jointly?
42. What is clear is that the claimant was undertaking largely the same work for both respondents at the same time, there was no distinction. It was agreed that the claimant was employed by the second respondent in the Spring 2016. There is no dispute that Bambizi Limited produced nursery furniture comprising two ranges 'Bambizi' and 'Lilies And Lions'. It was conceded by Mrs Matthews in evidence that the claimant worked with Bambizi including undertaking tasks for Lilies And Lions range of products. In fact, the claimant's role before and after the incorporation of Lilies And Lions was a similar role. Indeed, in Mrs Matthews witness statement at paragraph 14 states the claimant was carrying out a very similar role working for Bambizi and Lilies And Lions.
43. The claimant's evidence from the outset of her employment was that she worked for both Bambizi and Lilies And Lions ranges. It is clear that the claimant whilst working for Lilies And Lions Limited was still employed to work for Bambizi particularly placing orders, order processing, speaking with retailers, sales and new business. This is evidenced by the claimant's own candid admission in cross examination that "to be honest I didn't really know who my employer was".
44. The claimant's payslips for the months after the 1 September 2016, the date on which Mrs Matthews claimed the claimant left the employ of Bambizi Limited continued to carry the name of Bambizi Limited (pages 37-40) although Mrs Matthews claimed this was an error on behalf of her accountant. No evidence was provided as to how or why the error had occurred. Furthermore, Mrs Matthews sought to argue the fact that the payment reference on the claimant's bank statement read "Lilies And Lions" indicated that Lilies And Lions Limited was the claimant's employer and wages were being paid from Lilies And Lions Limited bank account. However, what Mrs Matthews patently failed to do was substantiate that contention in documentary evidence demonstrating the name of the bank account from which the claimant was paid was called Lilies And Lions Limited or that it was owned by the first respondent.
45. It is clear that the claimant's oral evidence was that at the beginning of August 2016 she had a meeting with Mrs Matthews and the following oral agreement was entered into, the claimant would be given a pay rise to lift her salary to £36,000 per annum, that increase was in recognition of the increased monthly mortgage costs the claimant would now incur as a result of re-mortgaging her house in order to raise funds to invest in the first respondent.

46. The above is corroborated by documents in the bundle, particularly at page 29 an emailed dated 15 February to Mrs Matthews stating:

“As you know I’m trying to sell my family home, no longer afford to keep my mortgage payments up due to the £10,000 pay cut (£36,000 to £26,000) implemented in November.”

47. The email of 27 March 2017 from the claimant to Mrs Matthews stating:

“You question my ability to invest, I was clear that I needed to re-mortgage to do this and that was why we agreed the increase in salary to meet this extra financial commitment.” (Page 28)

48. Further, on 27 March 2017 Mrs Matthews emailed the claimant stating:

“We both started on £38K as requested by you but the business can’t sustain those wages.” (Page 95)

49. The reference on the claimant’s bank statements which was attributed to the enhanced payments of £2,303.93 per month by the first and second respondents was “wages” (pages 46-47).

50. The enhanced monthly figure of £2,303.93 multiplied by 12 months equates to £27,647 a mere £2 short of the net annual figure (£27,649) for an employee on a wage of £36,000 (page 123). Clearly those figures are too similar to be coincidental in enhanced monthly payments to the claimant were in fact monthly net instalments for a £36,000 annual salary.

51. The suggestion by Mrs Matthews that the claimant was paid enhanced payments also as a loan or as a bonus simply is not borne out by any evidence. In fact, Mrs Matthews accepted in cross examination that the respondents had made three payments at £2,303.93 to the claimant for the months of August, September and October. In an email dated 9 May (page 25) Mrs Matthews states that the reason for not paying the claimant is “the business really cannot afford to pay our salaries just yet”. That completely contradicts the suggestion that the additional sums were a loan or bonus.

52. It is clear that the claimant and Mrs Matthews had entered into an oral agreement in August 2016 that the claimant would be paid £36,000 per annum effective from September 2016. That was the contractual arrangement for the claimant’s wages. The BACS payment for the following three months confirm and support that arrangement that a salary had been agreed at the rate of £36,000 per annum.

53. Mrs Matthews accepted that the claimant’s schedule of payments made to the claimant they are the first or the second respondent (at page 74B) is correct.

54. It is also not disputed that the claimant was not paid her salary at all from 1 April 2017.

55. It also follows that the claimant was ready and willing to work from April 2017 before she was signed off as ill by her GP. It is clear that Mrs Matthews made it difficult for the claimant to perform her role in April by changing the email passwords and the claimant's access to the respondent's computer systems.
56. The tribunal therefore concludes the following; that the deductions from the claimant's salary from the agreed rate of £36,000 was not authorised and amounts to an unlawful deduction.
57. There clearly was a failure to provide terms and conditions of employment, and provide proper itemised payslips certainly until March 2017.
58. It is also clear that the respondents failed to pay the claimant's statutory sick pay to which she was clearly entitled to when she went on long term sick following submitting sick notes from 19 May 2017 onwards until she finally resigned in November 2017. There is evidence of those sick notes in the bundle. That amounts to an unlawful deduction and failure to pay statutory sick pay.

Employment Judge Postle

Date: 24 April 2018

Sent to the parties on:

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For the Tribunal Office