Case Numbers: 3201255/2017
3201333/2017

RM

EMPLOYMENT TRIBUNALS

Claimant: **Mr M Shah**

Respondent: **Cortel Telecom Limited**

Heard at: **East London Hearing Centre**

On: **3 May and 14 June 2018**

Before: **Employment Judge M Hallen**

Representation

Claimant: In person
Respondent: Mr A Suleman (Company Accountant)

RESERVED JUDGMENT

The judgment of the Tribunal is that the Respondent made unlawful deductions from the Claimant's wages pursuant to Section 13 of the Employment Rights Act 1996 and the Claimant is awarded:-

1. **Wages for the month of September 2017 in the sum of £2,500 gross.**

2. **Car allowance in the sum of £225 gross.**

3. **Holiday pay in the sum of £279.58 gross.**

4. **In addition, the Claimant was wrongfully dismissed and is owed two weeks notice pay in the sum of £1250 gross.**

5. **The Respondent is ordered to pay the Claimant a total sum of £4,254.58 gross less the appropriate amount in tax.**

REASONS

Background

1 This matter was originally listed for a two day hearing on 22 and 23 February at which time, the Tribunal gave directions for the full consideration of the claim following the Tribunal's dismissal of the Respondent's application for a strike out of the Claimants claim

on the basis it had no reasonable prospect of success. At that hearing the Claimant confirmed that his claim was for unfair dismissal and unlawful deduction of wages and that he was not making a complaint under the Equality Act 2010.

2 The claim was listed for two days commencing 3 and 4 May 2018. At the start of the hearing, the Claimant withdrew his claim for unfair dismissal on the basis that he did not have two years service and was not entitled to make such claim. He confirmed his claim was limited to unlawful deduction of wages. As such, the Respondent could not make a counter claim against the Claimant as he was not making a claim for breach of contract.

3 On 3 May, the Tribunal heard evidence from the Claimant under oath and he was subject to questions in the Tribunal in cross-examination. The Tribunal had in front of it a core hearing bundle along with a supplemental bundle. The Tribunal read the Claimant's witness statement prior to his cross-examination as well as reading the witness statements presented by the Respondent which were at documents 12, 16 and 17 of the core hearing bundle. The witness statement at document 12 by Emdad Rahman and Kaf Abbas document 17 were not relevant to the issues before the Tribunal. The document number 16 in the core hearing bundle which was Mr Neville Sheen witness statement was relevant and was read by the Tribunal.

4 On the second day listed for the hearing of the matter on 4 May 2018, Mr Suleman on behalf of the Respondent made an application for a postponement of the hearing on the basis that Mr Sheen could not attend due to sickness. The application for a postponement was granted in the interest of justice and the matter was relisted for a further date to determine the issue of liability and remedies. At the commencement of the hearing on 14 June 2018, Mr Suleman attended but Mr Sheen did not attend. Mr Suleman confirmed that Mr Sheen was still not well enough to attend to give evidence but that the Respondent wished the matter to go ahead in the absence of the witness. He submitted to the Tribunal that the matter had been delayed long enough and that the Respondent wished to have finality on the matter. The Tribunal had the benefit of reading Mr Sheen's witness statement but noted that he was not in attendance to give evidence personally and be subject to cross-examination by the Claimant and questions from the Tribunal. Given the witnesses failure to attend to give evidence personally although the Tribunal read his witness statement, Mr. Sheen's evidence carried less weight. The Tribunal noted the Respondent's desire to have the matter concluded at the hearing without further postponements. Consequently, the hearing on 14 June was limited to the Respondent through Mr Suleman making oral submissions supported by a skeleton argument. The Claimant was also given an opportunity to make submissions.

Facts

5 The Claimant was employed by the Respondent as a New Business Sales Executive commencing his service on 17 October 2016. His letter of appointment was document 1 in the core hearing bundle and set out his salary at £2500 per month gross as well as setting out his entitlement to receive a car allowance of £450 per month gross being his "minimum payment for the allowance". In addition, the letter of appointment set out a sales commission target as well as responsibilities and duties also confirming that the Claimant was entitled to paid holidays.

6 At document 2 of the bundle of documents was the Claimant's contract of employment confirming his commencement date as being 17 October 2016 and setting out his job title as "sales consultant". At clause 2 of the contract his annual salary was set out as £30,000 per annum confirming that the Claimant was entitled at clause 10 to 21 days paid holiday as well as public holidays. Clause 20 of the contract confirmed that the Claimant was entitled to two weeks notice or payment in lieu of notice following the first 12 months of completed service.

7 Document 7 in the core hearing bundle contained a letter sent to the Claimant dated 31 August 2017 which is specified "warning for failing to make any key performance indicator setting 11 month". The letter starts of

> *"I have discussed the failure that makes any of your set KPIs this is now a written warning that you must make a KPI of £8,000 gross profit in September. You will only be paid a basic salary if you have covered the basic gross profit KIP of £8,000 in the month of September based on total contract value. If you fail to deliver sign contractual agreements for business at a combine value in excess of £8,000 then you will only be paid 20% of the business value that you have delivered. If you complete business value above £8,000 then you will be paid on the same basis as you are in July. This will include a commission payment of at least £1,200. If the deal is shared then your share must be over £8,000 GP. Let me remind you that that is an £222 per month over 36 months.*
>
> *You will still be paid expenses provided you have confirm the meeting in advance with Kaf Abbas and me with the reason for the meeting agreed by one of us.*
>
> *I need to make you aware that any business that is in your pipeline is covered under your trust and confidence letter.*
>
> *This letter is valid for three months. Please feel free to communicate your response personally in writing if you think it is necessary. Please sign and return a copy of this letter to confirm receipt."*

8 The letter was signed by Neville Sheen the director of the company. Below his signature was a receipt confirmation to be signed by the Claimant. The letter was not signed by the Claimant. The Claimant confirmed in evidence that he worked under protest during the month of September as he did not accept the company's unilateral variation of his contract of employment. He gave evidence which was accepted by the Tribunal that he wished to ascertain whether the Respondent would go through with its threat to withhold his wages at the end of September before he decided on the appropriate action to take. When the Respondent did go ahead with its threat not to pay him his contractual wages at the end of September the Claimant by email dated 2 October 2017 which was document 9 in the core hearing bundle resigned from his employment. In this email he said as follows:

> *"I am writing to appeal the fact that you have not paid me my wages or amounts owed for salary, expenses and plus commission.*
>
> *I would like to point out that at no point have I approved any deductions from my*

wages by you nor have I returned and signed letter from you, but I have kept copies.

Also, this letter is formally notifying you that I am no longer to work for Cortel and I am forced to resign constituting constructive dismissal....."

9 During the month of September following delivery of the letter of 31 August 2017 which the Claimant received on 4 September 2017, he worked as normal from home. In addition, during the majority of his service with the Respondent the Claimant made a car allowance claim for usage of his motor car in the sum of £450. The Respondent paid this car allowance as the Claimant was using his motor vehicle as part of his job and the Respondent had already indicated that he would receive a car allowance of £450 per month as a minimum payment as set out in this letter of appointment which was document 1 of the bundle of documents. The Respondent however at the hearing, sought to dispute payments of the Claimant's car allowance for the month of September on the basis that his car was over three years old. The Tribunal did not accept the Respondent's evidence. The Tribunal noted that the Claimant was paid his car allowance for the majority of his service and even though the car was over three years old, the Claimant was justified in making the car allowance claim for the month of September being half of the total amount claimed. It seemed to the Tribunal that the Respondent was aware of the age of the Claimant's car and was seeking to withhold this payment for no justifiable reason.

The Law

10 Where an employee resigns as a consequence of the Respondent's conduct (in this case a failure to pay contractual wages) he has to prove to the Tribunal that the company was in fundamental breach of contract. A failure to pay contractual wages would be such a fundamental breach. In such circumstances the Claimant is entitled to resign with or without notice and is entitled to claim contractual notice pay as a consequence of the Respondent's fundamental breach of contract. In this case, pursuant to the Claimant's contract of employment which was document 2 in the core hearing bundle of documents he was entitled to two weeks notice or payment in lieu of notice.

11 Pursuant to Section 13(1) of the Employment Rights Act 1996, an employer shall not make deduction from wages of a worker employed by him unless:

"(a) the deduction is required or authorised to be made by virtue of the 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."

Tribunal's Conclusion

12 In this case, the Claimant was employed under a contract of employment as well as a letter of appointment. These documents were contained at 1 and 2 of the bundle of documents. Both documents confirmed the Claimant's job title and the rate of pay to which he was entitled namely £2500 per month translating to an annual gross income of £30,000 per annum. In addition, the contract of employment confirmed the

commencement date of service being 17 October 2016 and both parties accepted that the effective date of termination was 2 October 2017 by reason of the Claimant's resignation with immediate effect. The contract of employment which was document 2 in the core bundle confirmed also the Claimant's right to receive the minimum entitlement of statutory holidays as well as setting out the Claimant's contractual entitlement two weeks notice after the first 12 months of employment. The letter of appointment at document 1 confirmed that the Claimant was entitled to £450 per month as a minimum payment in respect of a car allowance. These were all contractual terms which could not be varied without the employees consent and agreement.

13 The Respondent by a letter dated 31 August 2017 (quoted in the facts section of the judgment) sought to vary the employee's contract of employment and did so without obtaining the employees consent. The letter which the Claimant received on 4 September 2017 was marked "warning for failing to make any key performance indicator set in 11 months" and sought to vary his basic wage of £2,500 per month by stipulating that it could only be paid if he hit certain targets. Prior to this letter, the Claimant had received his basic wage of £2,500 per month gross without such stipulation. The letter was signed by Mr Sheen, the director of the company and required a confirmation receipt by the Claimant. The Claimant did not sign the confirmation nor agree to the unilateral variation. The Respondent sought to argue at the hearing that by working for a further month the Claimant had accepted the variation. The Tribunal did not accept this argument and preferred the evidence of the Claimant namely that he was waiting until the end of September to see whether the Respondent breached the contract of employment with him by not paying him his basic wage. When the Claimant ascertained that no payment of his basic salary had been made he resigned from his employment by email dated 2 October 2017 saying as follows:

> *"You have not paid me my salary and threatened not to pay me without any prior notice or approval."*

The Tribunal was of the view that it was reasonable for the Claimant to wait for the Respondent to breach the contract of employment by failing to pay him his contractual salary before deciding to resign from his employment. When the Respondent breached its contract of employment the Claimant was entitled to resign from his employment by reason of the employer's conduct which in the Tribunals view amounted to a fundamental breach of contract. This was a constructive wrongful dismissal of the Claimant and therefore the Claimant was entitled pursuant to clause 20 of his contract of employment to two weeks notice or paying in lieu of notice. Accordingly, the Tribunal awarded him the gross sum of £1,250.

14 As the Respondent had not paid the Claimant his final contractual salary during the month of September and the Claimant had earned it by working from home as was agreed by both parties, the Tribunal awarded him the sum of £2,500 gross in respect of his final month salary.

15 The Respondent agreed that the Claimant was owed 2.42 days accrued holiday and the Tribunal awarded the gross sum of £279.58 in this regard.

16 With respect to the Claimant's entitlement to 50% of his car allowance, the Tribunal awarded him the sum of £225 gross. The Tribunal noted that the Respondent paid the Claimant his car allowance for the majority of his service and so there was no good reason why the Respondent should not pay this sum. Even though the Claimant's car was more than three years old, the Respondent had ample opportunity to ascertain the age of the car and/or question the Claimant about his claim for a car allowance if it felt that it was not in order to pay it. The Respondent took no such opportunity to question the Claimant in this regard quite happily paying the car allowance for the majority of his service. Therefore, the Tribunal awarded the Claimant the sum of £225 in respect of his outstanding car allowance. Accordingly, the Tribunal ordered the Respondent to pay the following sums:-

16.1 The Claimant's outstanding salary for the month of September 2017 in the sum of £2,500 gross.

16.2 The amount of 50% of the Claimant's care allowance for the month of September in the sum of £225 gross.

16.3 2 weeks notice in the sum of £1,250 gross.

16.4 2.42 days holiday pay in the sum of £279.58 gross.

16.5 Total £4,254.58 gross less the appropriate amount of tax.

Employment Judge Hallen

20 June 2018