RM

EMPLOYMENT TRIBUNALS

Claimant: **Mr S Murdoch**

Respondent: **Creativepool Limited**

Heard at: **East London Hearing Centre**

On: **21 May 2018**

Before: **Employment Judge Russell**

Representation
Claimant: **In person**
Respondent: **Mr M Tomes**

JUDGMENT

The judgment of the Tribunal is that:-

1. **The claim for breach of contract fails and is dismissed in respect of notice pay.**

2. **The claim for unauthorised deduction from wages succeeds in some £817.32.**

3. **The employer's contract claim fails and is dismissed.**

REASONS

1 The Claimant commenced employment with the Respondent on 22 May 2017 as a talent manager. There was no written terms of agreement in the sense of a formal contract but the principal terms of the contract were included in the offer letter dated 19 May 2017. It is common ground that the Claimant was entitled to £42,500 per annum basic salary, which the parties agreed worked out as a net daily rate of £163.46. He was entitled to 28 days paid holiday each year and was expected to work from 9am until 6pm Monday to Friday with an hour for lunch. He was be entitled to two weeks' notice of termination during the initial six month probationary period.

2 The offer letter also included the following:

"**Full details of all your terms and conditions of employment are contained in the statement of**

> **employment particulars and the staff handbook copies of which will be provided to you on your start date.**"

3 In its contract claim, the Respondent relies upon a term in the staff handbook which provides that it will be an act of gross misconduct to undertake private work in normal working hours, using the company's database other than for the job, taking part in activities which cause a question about personal integrity and work for competitors.

4 Irrespective of the express terms in the handbook, there is an implied duty of fidelity in every contract of employment which requires that an employee devotes their working time to the best interest of their employer, not for their own personal interests and not to compete with the employer. Whether there has been a fundamental breach of that duty must be considered objectively; not every breach will be an act of gross misconduct. For example, if a family member were to call during the working day to discuss a personal matter. Whereas both are strictly speaking a use of working time for personal interest, a one-off short conversation for an important reason is unlikely to be an act of gross whereas repeated conversations regularly lasting for long periods of time about social arrangements may be.

5 In fact a statement of employment particulars and a copy of the staff handbook were not provided to the Claimant. I accept Mr Tomes' evidence that they are held electronically on a server operated by the Respondent and to which employees have access. There may be good practical reasons for not printing out what might be a very lengthy documents but in order for any contractual terms within them to be effective and binding upon the employee, it is at least necessary for the employer to show that he has taken reasonable steps to draw them to the employee's attention. On the facts of this case, I am not satisfied that the Respondent has done so. The offer letter said that copies would be provided and the same letter does not inform the Claimant that the documents could be accessed electronically, for example by including the link and a statement that the documents are important and must be read. For those reasons, I accept the Claimant's evidence that he was not aware of any terms contained in those documents.

6 On 13 November 2017, Mr Tomes gave the Claimant notice of termination of his employment. As the Claimant was entitled to weeks' notice, the employment should have terminated on 27 November 2017.

7 On 15 November 2017 the Claimant had to stay at home to wait for a locksmith. He had informed Mr Tomes and his manager, Mr Morris, the day before and I accept that it was agreed that the Claimant would work from home. The Claimant offered to take half a day's holiday. With the knowledge of Mr Morris, the Claimant took a further half day interview to attend an interview on 21 November 2017. The Claimant's last day in the office was 24 November 2017.

8 On 28 November 2017 the Claimant was paid his final salary which included a total deduction of £1,471.15. This comprised a deduction of £980.77 for "unpaid leave" and £490.38 for "holiday overpay deduction".

9 It was common ground that the Claimant had taken 13 days' leave between 31 July 2017 and 16 August 2017. The Claimant accepts that he took two further half days (15 and 21 November 2017). As he had only been employed for five months, he had accrued entitlement to only 10 days leave pro rata. As such, the Respondent was entitled

to recoup four days overpaid holiday on termination (in the sum of £653.83).

10 Where the parties disagree are in respect of the six days "unpaid leave" where the Respondent asserts that the Claimant was paid for days when he was not in fact working, these were 23 June, 29 September, 5 October, 15 November, 21 November, 24 November 2017. The Claimant's case is that he was at work and was entitled to be paid for those days (other than the two half days referred to above).

11 The Claimant's evidence was that he had not completed a leave form and that on each of the dates listed by the Respondent he was working. He relied upon evidence from a tracking application on his mobile phone to show either that he attended the office or that he was engaged on events and meetings for the Respondent off-site.

12 The Respondent's case is that a review of the Claimant's email account showed that there were very few emails on the dates listed and, as one might reasonably expect there to be a large number of emails, this was indicative of the Claimant's absence from the office. The Respondent also relies upon a spreadsheet compiled by the office manager and Mr Reece Morris. This spreadsheet shows the total number of days' absence in each of the months from June to the end of August 2017. This shows that the Claimant was absent on one day in June, one day in July and 12 days in August 2017. The Claimant's absence in June is recorded as "U" rather than "H" for holiday or "S" for sickness. Mr Tomes says that this is "unpaid" which he described as pay which *is* paid at the time but that "we see at the end of the year". There is no provision in the offer letter nor any other agreement advanced which entitles the Respondent to pay and then clawback salary in this rather vague way.

13 On balance, I accept the Claimant's evidence that he was engaged in work on behalf of the Respondent on each of the dates in question. As well as the tracking app showing him at the office on 23 June and 29 September, for 5 October 2017, the Claimant has adduced documentary evidence to show that he attended at a conference in Central London on behalf of the Respondent, this was why there were very few emails sent that day. Mr Tomes conceded that he did not know whether this was a work-related event or not. For 15 November 2017, the Claimant has adduced messages between him and Mr Morris confirming his attendance at meetings in the afternoon. I do not draw any adverse inference about the credibility of his evidence, but I do find unreliable Mr Tomes' evidence that the Claimant was paid for days he did not work. Mr Tomes has relied upon the information provided to him by others and an assumption drawn from the mere absence of emails without proper consideration of whether there may be good work related reasons for that. There is no office spreadsheet for September, October or November 2017. Mr Tomes was largely absent from the business for personal reasons yet there is no evidence from Mr Morris about what was happening. Having regard to all of the evidence, I prefer that of the Claimant and find that he attended work for the Respondent on each of the days and that he was contractually entitled to be paid. The claim for unauthorised deduction from wages succeeds in the sum of **£817.32** (total deduction of £1,471.15 less the recoupment for £653.83, being four days' excess holiday).

14 As for notice pay, the Claimant's notice expired on Monday 27 November 2017 and his last working day in the office was Friday 24 November 2017. In other words, he had two working week's pay between being given notice and the termination of his employment. I accept Mr Tomes' evidence that in such circumstances the Claimant was paid his notice in full even if his effective date of termination was brought forward. The

claim for notice pay fails.

15 The employer's contract claim for damages of £8,640 relies upon an assertion that the Claimant committed an act of gross misconduct when he sent his CV to a client of the Respondent by email at 10.05am on the 23 November 2017. The full email read:

> **"Hi**
> **Please find attached my CV due to redundancy I am now looking for temporary work whilst I secure a new permanent position happy to discuss all positions to keep me busy whilst I am looking."**

16 Mr Tomes' evidence was that the recipient of the email was a longstanding and valued client, indeed the first the Respondent had, the email had been sent during working hours and that this contact both misused the Respondent's confidential information and caused it reputational damage. The Claimant's evidence was that he was not aware of this, the recipient was a recruiter who had contacted him by Linked-In, and he was not using the Respondent's contacts but his own job recruitment experience generally to gain a temporary job.

17 In deciding whether or not this was a breach of contract by the Claimant, I had regard to my finding above that he had not been provided with a copy of the handbook containing the express term upon which the Respondent sought to rely. I considered the implied duty of fidelity and whether the conduct of the Claimant amounted to a breach. This was a single, short email albeit sent during working time. The Respondent has analysed the Claimant's email account extensively since his departure and no other evidence of dealing with personal matters in work time is adduced in evidence today. Mr Tomes believes that there "must have been" other times; I do not agree and accept the Claimant's evidence that other attempts to obtain work were conducted in his own time, for example the half day holiday taken to attend an interview.

18 The implied duty of fidelity does not prevent an employee from making preparations to leave work and even to contact individuals known to them through their existing employment so long as they do so in a manner which is not an intention to compete or an abuse of their position. I conclude that the Claimant's conduct in providing his CV by email to a recruiter in his search for a temporary job falls far short of a breach of that implied term, even if the email was sent in working hours. Whilst I accept that Mr Tome's concerns were genuine, they were misplaced and subjective; this was not a breach of contract. The employer's contract claim fails and is dismissed.

19 The Claimant seeks interest on the sums that have been awarded to him I do not make any award of interest there is no powers in the Tribunal rules to do so or the Employment Rights Act.

Employment Judge Russell

3 July 2018