



EMPLOYMENT TRIBUNALS

Claimant

Ms V Charalambous

Respondent

Venturespring Limited

AND

HEARD AT: London Central **ON:** 25 October 2018

BEFORE JUDGE: Employment Judge Hemmings

Representation

For Claimant: Mr S Liberadzki (Counsel)

For Respondent: Not present – No Response entered

JUDGMENT

The Judgment of the Employment Tribunal is to award the following sums payable by the Respondent to the Claimant:

- (1) Arrears of wages of £15,421.30
- (2) Outstanding holiday pay of £5,538.42
- (3) Unpaid commission of £37,394.08
- (4) Outstanding expenses of £2,327.91
- (5) Unfair dismissal compensation in the sum of £36,249.92

The Claimant's claim that the Respondent failed to provide her with statutory Written Particulars of Employment was dismissed on withdrawal. The Claimant's claim to a shareholding in the Respondent was withdrawn but not dismissed.

REASONS

1. By a Claim Form presented to the Employment Tribunal on 23 April 2018 following unsuccessful Early Conciliation through ACAS the Claimant, Victoria Charalambous complains that the Respondent, Venturespring Limited, failed to provide her with statutory Written Particulars of Employment, that she is owed arrears of wages, holiday pay, unpaid commission and outstanding expenses, and that she was unfairly dismissed by the Respondent, those claims arising out of her employment as the Respondent's Commercial Director between 27 June 2016 and 29 November 2017. The Claim Form alerts the Respondent to the fact that very substantial sums of money are being sought by the Claimant from the Respondent by way of compensation and damages.

2. The mandatory ACAS process, conducted between 24 February and 24 March 2018, failed to resolve the dispute. The Respondent has not entered a Response to these proceedings nor engaged in this litigation in any respect whatsoever. No Default Judgment against the Respondent has been made under Rule 21(2). The Respondent, through its Managing Director Cassandra Harris, emailed the Tribunal in Without Prejudice terms yesterday, 24 October 2018, enquiring about how the Respondent could put its side of the case forward, appearing to indicate that whilst she had been abroad an organisation offering employers legal representation in Tribunals had let the Respondent down by failing to organise such representation. The Regional Employment Judge responded to Ms Harris indicating that the case would proceed today, the Notice of Claim having been sent to the Respondent's registered office. It is evident that the Respondent is aware of these proceedings, having arranged representation. The Notice of Claim dated 12 June 2018, properly addressed to the Respondent, as was subsequent correspondence regarding the Respondent's exposure to a Default Judgment, informed the parties that two full days of Tribunal resource had been allocated for this Final Hearing for the Claimant to present her claims and for the Respondent to defend them.
3. Ms Harris was not present at 10 am. The Tribunal's clerk conducted a fruitless search of Victory House and checked for any last minute communications by or on behalf of the Respondent. Ms Harris did not appear to have communicated further with the Tribunal to explain her absence or her intentions, and nobody else was present acting as a representative of the Respondent. Commencement of the hearing of evidence was postponed until 11 am at which time the situation remained unchanged.
4. Accordingly, no Response having been entered, no application to extend time having been made, the Respondent having breached every Case Management Order made by the Tribunal, nobody representing the Respondent being present to explain the Respondent's position and to make any applications to extend time for entering a Response and a postponement of this Final Hearing for that purpose (without which, by virtue of Rule 21(3), the Respondent has no right to be heard at today's hearing) the case proceeded.
5. The Tribunal had before it a statement from the Claimant and a Schedule of Loss to which she testified under oath, and a comprehensive file of documents, marked Exhibit C1, relevant to her claims. References to page numbers in these Reasons are to that file.
6. The Tribunal did not assume that the Claimant's claims were well-founded but required the Claimant to verify her claims in detail and to answer specific enquiries from the Employment Judge.
7. It transpired that the File of documents included a document, at pages 51 to 69, which satisfied Part 1 of the Employment Rights Act 1996 in respect of the obligation of the employer to provide an employee with statutory Written Particulars of Employment.
8. The Claimant also accepted that the Employment Tribunal has no jurisdiction to order shares to be issued to a party. The Part 1 claim was withdrawn and dismissed. The Claimant also withdrew her claim in respect of shares. That claim was not dismissed, the Claimant wishing to preserve the option of issuing civil proceedings in the High Court.

THE ISSUES

9. The first issue is whether the Respondent has made unlawful deductions from wages by withholding payment of £15,421.30.

10. The second issue is whether there is any statutory and contractual holiday entitlement outstanding which requires to be commuted into a sum of holiday pay, the Claimant seeking the of £5,538.42.
11. The third issue is whether the Respondent has made unlawful deductions from wages by withholding outstanding commission of £37,394.08.
12. The fourth issue is whether the Respondent is in breach of contract through failing to pay outstanding expenses of £2,327.91.
13. The fifth and final issue is whether or not the Respondent unfairly dismissed, automatically, the Claimant by constructively dismissing the Claimant because she sought to enforce a statutory right not to suffer unlawful deductions from wages.

THE FACTS

14. The Respondent, Venturespring Limited, is a business management consultancy supporting technology start-ups to meet the strategic, operational and funding challenges of successful growth and development within the digital sector. Its Managing Director is Cassandra Harris, the controlling shareholder. Ms Harris' ambitions for exponential growth between 2017 and 2020/21 are set out at pages 103 to 104.
15. Ms Harris' personal network included Victoria Charalambous, the Claimant, who prior to joining the Respondent, undertook comparable consulting work for individual clients.
16. Ms Harris had identified the Claimant as somebody with the potential to contribute value to the Respondent's commercial, operational and strategic ambitions.
17. Ms Harris invited the Claimant to join the client-event the Respondent was hosting at the 2016 Monaco Formula 1 Grand Prix as a fully funded guest.
18. Ultimately, following recruitment discussions incorporating aspirations of success-related high earnings, based on a high core salary and substantial commission-based rewards and dialogue on an ultimate equity share in the business, the Claimant commenced employment as the Respondent's full-time Commercial Director effective from 27 June 2016, based at its London offices.
19. The Claimant's duties encompassed primary responsibility for sales and partnerships, conducting sales activities, creating developing and maintaining key client relationships, and participation in strategic business-planning decision-making in respect of the Respondent's business itself. The Claimant reported directly to Ms Harris. The high regard Ms Harris had for the Claimant after more than 15 months working together is evident from her email to the Claimant on 9 August 2017, at page 93.
20. The contractual arrangements for the employment relationship incorporated a number of terms and conditions, including a monthly net salary after PAYE, of £4,500, commission of between 15% and 20% of net revenue i.e the amount invoiced to clients less delivery-costs, in relation to client-matters in which the Claimant was directly involved, ultimately converted by agreement to a single permanent rate of 15%.
21. There were periodic discussions regarding an ultimate equity shareholding for the Claimant, but whether or not those discussions created any legal entitlements is beyond the jurisdictional scope of the Employment Tribunal. The Claimant's proposal to Ms Harris to consolidate her seniority and reward, under the enhanced title of Co-Founder, Business and Partnerships Director, is at pages 106 to 108.

22. The Claimant agreed to accept a lower net monthly base salary initially under a contractual arrangement providing for £2,500 per month which was agreed, contractually, would move to the sum of £4,500 per month net of PAYE, permanently under a condition-precedent that the higher rate would be engaged whenever the Respondent secured a specific new-client contract, under active negotiation, anticipated to crystallise within a few months.
23. From June to October 2017 inclusive the Claimant was paid at that lower rate of £2,500 per month. She makes no complaint about those reduced earnings.
24. Between the months of November 2016 and March 2017 the Claimant was paid at the rate of £4,500 net of PAYE.
25. Tensions in the working relationship between Ms Harris and the Claimant emerged in the spring of 2017 apparently related to disappointing commercial performance and liquidity, dynamics which are often stressful and can be corrosive.
26. Payments of salary at £4,500 per month were not honoured and, separately and significantly, the Claimant felt increasingly excluded by Ms Harris from business and strategy decision-making.
27. Specifically, the Claimant was paid £3,000 per month for March, April and May 2017, not £4,500 net, and at the rate of £3,500, not £4,500, from June 2017 onwards. The Claimant was promised that the underpayments would be rectified whenever the Respondent's financial position permitted it, but that did not materialise.
28. On 4 April 2017, by email, the Claimant presented the Respondent with a Grievance regarding her treatment and the unlawful shortages in the salary paid to her. The grievance was substantially ignored by the Respondent and was never resolved and the resulting tensions during the summer of 2017 are evidenced in the documents within the file marked C1.
29. By the time of the Claimant's resignation, effective at the end of November 2017, the Claimant had been substantially underpaid, without her consent or acquiescence.
30. The Respondent's cashflow difficulties also resulted in the Respondent withholding certain commission payments, estimated at the time of commencement of these proceedings, by the presentation of a Claim Form, to be in the underpayment sum of £40,245 and calculated before the Tribunal today as amounting to £37,394 08.
31. By way of illustrative example only, the commission payable to the Claimant at 15% in respect of one particular client, anonymised by the Tribunal to respect the client's confidentiality, was £33,644.52, which the Respondent under-calculated as amounting only to £19,170.87.
32. It is apparent, and again perfectly understandable, that the situation was stressful for all concerned and undermined relationships. The Claimant suffered adverse stress-related health reactions and the situation would also have been, undoubtedly, a stressful and challenging period for those owning the business.
33. The Claimant repeatedly challenged the Respondent regarding its repetitive and multiple breaches of its statutory obligations to her, by underpaying salary and commission and withholding reimbursement of expenses. Extensive documentation regarding the financial issues is at pages 204 to 225.

34. The Claimant tendered her resignation on 31 October 2017, at page 147, because she considered the Respondent to be in fundamental breach of contract by failing to pay her due salary, month after month, and underpaying commission and excluding the Claimant from involvement in strategic commercial decision-making, destroying the trust and confidence in the employment relationship.
35. The Claimant believed that her adverse treatment by Ms Harris, isolating and excluding her from operational and strategic processes, derived from Ms Harris' antipathy towards the Claimant's assertions that the Respondent was acting unlawfully, in breach of its obligations to the Claimant, and that Ms Harris adopted a manipulative strategy, aspiring to end the employment relationship through the Claimant resigning.
36. The Claimant served lawful notice of one month on the Respondent and received written confirmation on 6 November 2017, at page 148, from the Respondent's HR adviser, Alison Holt of the external HR consultancy providing personnel services to the Respondent, "HR Required," that her last date of employment would be 30 November 2017.
37. On 7 November 2017 Ms Harris placed the Claimant immediately on garden leave for the remainder of the notice period, although, as it transpired, the Claimant was instructed subsequently by Ms Harris to undertake certain duties during that period which, to the Claimant's credit, she did.
38. The Respondent then failed to make a final payment to the Claimant in respect of the salary for November 2017, the withheld wages referred to above, nor did it pay 18 days outstanding holiday entitlement, nor reimburse £2,327.91 of overdue business expenses.
39. Ultimately, the Respondent paid the Claimant a sum of £3,590 towards the arrears.
40. As at the end of November 2017 the Claimant was owed £15,421.30 in arrears of salary, holiday pay amounting to £5,538.42, commission amounting to £37,394 08, and unpaid expenses of £2,327.91.
41. Subsequently the Claimant has been exposed to projected future post-employment losses of earnings totalling £26,999.68

42. SUBMISSIONS

The Claimant relies upon her Claim Form, her statement under oath to the Tribunal and her Schedule of Loss to establish the Respondent's liability to her and the level of compensation required to remedy the outstanding payments and the compensation due for dismissing her constructively and unfairly.

43. THE LAW

The Employment Tribunal's function is to procure and conduct fair hearings resulting in just outcomes. It does so by applying the relevant principles of employment law to its findings of fact in respect of workplace related claims within its jurisdiction. In doing so the Tribunal seeks to fulfil the Overriding Objective set out in Rule 2.

The applicable principles of law, concisely identified as required by Rule 62(5) of Schedule I of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, are as follows, acknowledging that it is the statutory text which must be applied in reaching a judgment whilst having regard to the clarification and guidance on that text available to the Tribunal through the reported Decisions of the Higher Courts.

The law applied in the Employment Tribunal is to be found in the Common Law in relation to contract disputes but otherwise primarily in Acts of Parliament and Regulations made under the authority of Parliament, and found within authoritative Appeal Court Decisions explaining the operation and effect of those Parliamentary sources of law and reported in various hard-copy and on-line libraries of Law Reports and, finally, found within the body of recorded case-law constituting the Common Law of the land.

UNLAWFUL DEDUCTIONS

It is unlawful for an employer, by virtue of Part II of the Employment Rights Act 1996 to withhold wages which have been earned in the absence of any lawful excuse for withholding them.

BREACH OF CONTRACT

The starting point for the Tribunal is to identify the intention of the parties to the contract and to require the parties to honour the enforceable obligations they intended to create in the event of a dispute which comes before a Court of Law.

The burden of proof in a contract claim is on the Claimant i.e to succeed the Claimant must establish the merits of their claim and meet the standard of proof. That standard in a contract claim is to establish the facts underpinning the merits of the claim on the balance of probabilities.

HOLIDAY ENTITLEMENT

The Working Time Regulations 1998 provide a statutory entitlement based on European law of a minimum of 20 days paid holiday per annum, increased to 28 days by an additional eight days under UK Domestic law. The terms of a contract of employment may enhance those entitlements further.

UNFAIR DISMISSAL

Under s.94 of the Employment Rights Act 1996 an employee has the right not to be unfairly dismissed by her employer.

Generally such protection against unfair dismissal is dependent upon a minimum of two years' continuous employment – s.108 Employment Rights Act 1996. There are exceptions. One exception is s.104 of the Employment Rights Act 1996 which provides that:

An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or if more than one, the principal reason) for the dismissal is that the employee –

.....(b) alleged that the employer had infringed a right of his which is a relevant statutory right

S.104(4) encompasses a breach of the obligation not to make unlawful deductions from wages.

The requirement of two years' service in these circumstances is disapplied by s.108(3)(a) Employment Rights Act 1996.

The circumstances amounting to a dismissal in law are set out in s.95 Employment Rights Act 1996. Section 95(1)(c) provides that:

An employee who is dismissed in law in circumstances where the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct

An employee is entitled to terminate the contract of employment without notice where the employer is guilty of a fundamental breach of contract such as a failure to pay salary and other financial remuneration. The victim of a fundamental breach of contract can chose either to

accept the breach as bringing the employment relationship to an end e.g by resigning or can elect to maintain the contractual relationship with their employer.

44. CONCLUSIONS

- (1) On the basis of the evidence placed before the Tribunal, a credible case of consistent and multiple breaches by the Respondent of its legal obligations to the Claimant under employment laws governing the workplace has been established. In the absence of any legitimate basis to doubt the integrity of the Claimant's evidence, her testimony under oath, her supporting documentation, and her Schedule of Loss (the reliability of which the Tribunal has tested and accepts), the Tribunal concludes that the claims, other than those withdrawn, are well founded in both terms of liability and the extent of the amounts claimed.
- (2) The Tribunal is satisfied that the Claimant resigned for a number of reasons including the Respondent's financial default, the stress this caused and its adverse impact on the Claimant's health and sense of wellbeing, but the Claimant resigned principally because the Respondent set out to undermine the working relationship because of the Claimant's persistent assertions to the Respondent that withholding her salary and other payments was unlawful and her insistence that those payments to her be honoured as required by law.
- (3) The claims succeed and compensation and damages are awarded as follows:
 - (i) Arrears of wages of £15,421.30
 - (ii) Outstanding holiday pay of £5,538.42
 - (iii) Unpaid commission of £37,394.08
 - (iv) Breach of contract – outstanding expenses of £2,327.91

These sums are gross amounts before PAYE which the Respondent is obliged to process and to account for to HMRC.

AUTOMATIC UNFAIR CONSTRUCTIVE DISMISSAL

- (4) No basic award is sought nor is it available in respect of the finding of automatic unfair dismissal, the Claimant not having been employed for a minimum period of two years.
- (5) In respect of the Compensatory Award, to the Claimant's credit she has mitigated substantially her loss of earnings since her resignation through undertaking freelance consultancy work. Her current contract is about to expire and she legitimately anticipates a future loss of salary resulting from her unfair constructive dismissal over the coming six months at the rate of £1,038.46 per week, totalling £26,999.96.
- (6) The Claimant seeks an uplift of 25% on the compensatory payment by virtue of the Respondent's disregard of the grievance process. That disregard was, in the judgment of the Tribunal, abject and warrants an uplift at the top end of the available percentage.
- (7) Accordingly, the projected future losses of £26,999.96, uplifted by 25% (£6,749.99) produces a compensatory award of £33,749.95.
- (8) £30,000 of that compensatory sum will be free of tax. The balance will be subject to tax at 40%. In order to ensure that the Claimant is fully compensated, the Claimant requested the Tribunal to uplift the sum of £33,749.95 by £1,499.98 (tax at 40% on £3,749.95), grossing up the sum therefore of £33,749.95 such that, after such deduction of tax as the Respondent is obliged to make under HMRC provisions, the net amount received by the Claimant in respect of the compensatory award for loss of employment will be £33,749.95.

- (9) On reflection, that is not the correct formula for grossing up. The amount required to provide the net sum of £3,749.95 after 40% tax is £6,249.92. This correction to the sum announced to the Claimant at the conclusion of the Final Hearing is made by the Employment Judge under Rule 69. Accordingly, the compensatory award made for the unfair constructive dismissal of the Claimant is £36,249.92.
- (10) In total, the Respondent is ordered to pay to the Claimant, less such tax and national insurance contributions, as it is obliged by law to deduct, the sum of £96,931.63.
- (11) As a concluding observation it can be seriously challenging for any Court of Law to conduct a fair hearing resulting in a just outcome i.e in the Employment Tribunal fulfilling the Overriding Objective when a Respondent fails to participate in any way whatsoever with the litigation and with the Tribunal. Nevertheless, in this case the Claimant's claims were clearly set out from the outset, monies are evidently due and well overdue to the Claimant, ACAS attempted to conciliate a resolution during the course of a month, and the Claimant's case was prepared comprehensively through her Grounds of Claim in her Claim Form, her written statement to the Tribunal, her Schedule of Loss and the extensive file of documents extending to more than 200 pages. The judgment reached by the Tribunal reflects the Claimant having established her claims, liability and quantum as well-founded and to the standard of proof required by the Tribunal.

Employment Judge Hemmings

Date 14 December 2018

JUDGMENT AND REASONS SENT TO THE
PARTIES ON

18 December 2018

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FOR THE TRIBUNAL OFFICE