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EMPLOYMENT TRIBUNALS

Claimant: **Mr D O'Neill**

Respondent: **Osborne Baldwin Ltd**

Heard at: **East London Hearing Centre**

On: **28 August 2018**

Before: **Employment Judge Prichard**

Representation

Claimant: Mr I D Lewis (solicitor, Bray & Bray Solicitors, Leicester)

Respondent: Mr B Henry (direct access counsel)

JUDGMENT

It is the judgment of the employment tribunal that the claimant's claim for arrears of pay succeeds. The claimant is awarded £33,000. It is a net payment.

REASONS

Full reasons having been announced to the parties at the above hearing, and the above written judgment without reasons having been sent to the parties on 12 September 2018, and reasons having been requested by the respondent by email of 25 September in accordance with Rule 62(3) of the Rules of Procedure 2013, the written reasons follow below.

1. This has been a difficult case. There have been large gaps in the evidence. There have been large gaps in both representatives' legal analysis of the situation here.

2. The background of this dispute is a director / shareholder dispute over the running of this company. The respondent is a company regulated by the FCA which

attracts funds from high net worth individuals for investment in real estate in the UK and also in Germany. It used to have a presence in Marbella in Spain but no longer.

3. The company was technically founded by the claimant. He had a company of his own called Haspel Ltd. He had previously met Mr Reece Mennie for whom he had worked at another employer in a similar business. Mr Mennie wanted to set up a company and the 3 agreed. The name was changed to the current name of Osborne Baldwin Ltd (OBL). For a time, the business ran well and the 2 directors, each one a 50% shareholder, got on well.

4. The claimant and Mr Mennie had become PAYE employees of the company sometime in 2015. There is no dispute that the claimant was, and is still, an employee of the company and is still a 50% shareholder of the company.

5. Things became tense and difficult in 2017 according to both parties' accounts. Due apparently to movements in their Metro Bank account which were outside the normal range, the bank froze the account. No transfers in or out were accepted. Transfers in were returned to sender, which was an unusual situation. This situation continued from the end of June 2017 until the account was closed at the end of September.

6. These tribunal proceedings have been postponed 5 times, on the grounds that it was just about to settle. The parties have actually been just about to settle for what is now a year.

7. In the background there is the threat of High Court proceedings for unfair prejudice in which the claimant is also represented by Bray & Bray, as here.

8. The claimant and Mr Mennie had to forego their salaries for the months of June and July in the 14 months there had been since all this occurred. Mr Mennie who has remained with OBL informed the tribunal he has only taken some 2 or 3 months' worth of salary and he has foregone the rest. In fact, he invested a certain amount of his personal money into the company to keep it trading.

9. The 2 individuals also set up another company called Vaillante, on 4 March 2015. The purpose of Vaillante was to do the back-office work for Empire Property Holdings. They were both 50% shareholders in that company too.

10. Vaillante was subject to an FCA investigation in the latter part of 2017. The FCA found it unacceptable that a separate company was doing all the back-office work for Empire Property Holdings and the practice had to cease at once. Since then Vaillante has therefore had no income. I see from the company search that the accounts are overdue (now the confirmation statement). The company is classified as dormant which is curious because I did not think companies could be dormant if they had ever traded, which Vaillante certainly had for a time.

11. During 2017 for reasons which the parties have been singularly vague about, the claimant seems to have fallen out with many individuals in OBL. It is a small

company employing about 10 to 15 self-employed consultant sales people and administrative staff, of whom Tania and Kirbie were the ones I was told about.

12. Apparently sometime in June after Mr Mennie returned from holiday, some 4 members of the sales staff and also Tania threatened to resign because of the claimant. Mr Mennie had to persuade them to stay on.

13. He held a meeting with the claimant which was not recorded, at the Theydon Oak in Theydon Bois, quite near where he lives. They discussed the sale of the shareholdings. One was going to have to buy the other out. It seemed a simple decision. The claimant readily acknowledged that nobody there liked him anymore and so if anyone was going to have to buy out the other, it would be Mr Mennie. That is still the plan. There have been a lot of hitches. I have only been told about about the latest of these.

14. I find it hard to believe that an agreement which was envisaged to take a month to finalise has taken 12 months already. The latest hitch has been a disagreement about the initial registration of the shareholdings. The claimant had one £1 share. Rather than issuing more shares the company split that share in half and there is some irregularity in the registration of that which needs to be straightened out with Companies House before the agreement can be effective. I digress.

15. There was a later meeting off site on 19 July 2017 at the Hilton Hotel in Docklands. The meeting lasted about one and a half hours. (Because the respondent has an open-plan office it is difficult for them to get privacy to discuss something as sensitive as this).

16. At that meeting, it was agreed that the claimant would step back from involvement in the company. Mr Mennie considered it important that the claimant should no longer represent the company.

17. I find as a fact, and it is crucial in this claim, that it was not part of the agreement that the claimant would cease to be paid. Nor was the opposite agreed either, but nonetheless he was an employee who was paid £3,000 per month. They both were. Initially the claimant had waived his right to a salary.

18. I find as a fact also that, in the past, when there were cash flow problems, there had been breaks in the payment of both directors' salaries. Whenever that happened in the past there were no subsequent catch-up months. I find that effectively the pay was frozen for the time being.

19. I have been repeatedly referred to an email dated 25 July 2017 from the claimant to Cheryl Fisher. Cheryl Fisher works for the accountants who run the payroll. Their office is in Borehamwood (which is the registered office of Vaillante and OBL). It says simply:

"Hi Cheryl,

Just run Kirbie and Tania again this month please leave Reece and I on hold. Thanks

Dean O'Neill"

20. I consider it an important finding I have to make that the whole context of that instruction was that the Metro Bank account which contained £82,000 had just been frozen, no transfers in or out. Luckily Mr Mennie had a business account of his own that was not being used at the time. It was a sole trader account, Reece Mennie T/A RM sales. He therefore asked some of the bounced inward transfers in to be redirected to that account, so he could use funds to pay the payroll.

21. The claimant had agreed to step back from the running of the company. However, I consider that, as the dispute became more litigious, there has been a lot of position-taking about whether the claimant was "excluded" from the company or not. It is part of his position-building too for his intended unfair prejudice case.

22. The assertions the claimant makes are described by Mr Mennie as "rubbish", or in other words, fabrication. For instance, in a rather unlikely piece of evidence the claimant said he could only get inward bound emails on his HJ investment email (that is Hunter Jones the trading name of Osborne Baldwin) and could not send emails. I find that weird. I do not understand how that would happen on any email account, from my knowledge of emails. No-one could explain why this might have been occurring.

23. The claimant continues to have remote access to a lot of company systems including the important CRM (Customer Relations Manager). This is a sophisticated piece of software through which Osborne Baldwin ran all its transactions. You log on to it and do your work there where everything is recorded, and the history is preserved.

24. I have been referred to pages from the CRM which show the claimant going on to it often. In late in October, he went on several times a day. Other people's names appear there frequently too. I cannot imagine that they were just logging on to CRM if the real work was taking place elsewhere on spreadsheets as the claimant is now alleging.

25. I accept Mr Mennie's evidence that he is unlikely to be paying £5,000 per month for a piece of computer software which has outlived its usefulness, with a company that was struggling financially. Nor can I imagine people logging on just for the sake of creating a record of company activity for litigation purposes, as far back as October 2017. Things have gradually become more and more litigious now though, and people may be creating records to strengthen their own or someone else's position.

26. The claimant returned to the workplace briefly on 15 September and he says that Mr Mennie was on a fishing expedition to find out about his tactics. It seemed to me, having heard the evidence, that the opposite was more probable. It is more likely the claimant wanted to find out what was going on in the company that he was contemplating suing. He is contemplating action against Vaillante and OBL.

27. The agreement is for £350,000 which Mr Mennie states is a generous estimate of the claimant's shareholding. There is also an agreement for a continuing revenue share in Vaillante. That is now meaningless because Vaillante has had zero revenue since the conclusion of the FCA investigation.

28. Mr Mennie stated to the tribunal today that the claimant had agreed that he would not be paid. No such agreement was in the transcript that the claimant made of his covert recording at the Hilton Hotel meeting on 19 July. Mr Mennie said that the comments were made on the walk back from the Hilton to the company's office in Tiller Road Docklands. Later he said it might have been in the Tiller Road office.

29. It was pointed out to Mr Mennie that this, which would be a fundamentally important allegation, did not appear in his ET3, or in his witness statement for this hearing. I agree it would be an important point. I have to find on the balance of probabilities it was not said. Even Mr Mennie, whose evidence generally commended itself to me as truthful, said no more than it was his "opinion". That seemed to be based on the fact that he and the claimant go back some years and that he knows where the claimant is coming from. Opinion is not really strong enough for something as categorical as this. This is a matter of contract, contrary to what Mr Henry submits.

30. I was referred specifically to the defence that the company is making to this claim for arrears of pay. First of all, there is the argument under section 13(1)(b) of the Employment Rights Act which provides:

> "(b) the worker has previously signified in writing his agreement or consent to the making of the deduction."

It is submitted on behalf of the respondent that the email quoted above: "Just run Kirbie and Tania again this month please leave Reece and I on hold." Is that consent? Apart from the fact it is clearly upon the basis of on hold rather than being a once for all waiver of pay. I consider that this email is not enough to satisfy that this is an agreement in writing for an ongoing hold on pay pending the settlement agreement being carried out and settlement monies being paid. It is specific to "this month", in the context of the freezing of the Metrobank account and a monthly payroll. I do not consider the email is a s13(1)(b) agreement to the withholding of 10 months' salary

31. The second part of the defence is under section 13(3) which provides:

> "Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion … the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion."

The focus is on the words "properly payable". According to *New Century Cleaning v Church* [2000] IRLR, 27, CA the words "properly payable" have to be understood as properly contractually payable. There are differences in Wages Act/unlawful deductions claims as opposed to breach of contract. I know this is an unlawful deductions claim, not least because there is a £25,000 cap on breach of contract claims.

32. The claimant came into work on 15 September 2017. He did not stay long. He found out a few things. He did no work. There was a background arrangement that the claimant was to "work at home". Exactly what this meant I cannot think, other than that the immediate problem was that he had fallen out with many of the people who worked in the company and therefore it would probably serve the company's interest better if he was not there, making people feel like they wanted to resign. I was told by Mr Mennie that was one of the reasons the Spanish office closed down. The claimant was apparently distance-managing them in a way they resented and objected to. They left. Mr Mennie could not recruit new staff to replace the sales team there.

33. In this case, because of the basis on which I decide it, I do not need to make definitive findings about exclusion from the office or exclusion from systems. I was inclined to prefer the evidence of Mr Mennie to the claimant's in that regard, as explained. It may be of more importance in the unfair prejudice case.

34. The claimant agreed that he had done nothing for the company. That was because of the Hilton agreement on 19 July that he would step back from the company and not put himself forward as representing the company. It is hard to see what meaningful work he could have done. It remained important for both parties for the claimant to say he was excluded and for the respondent consistently to say that he was not excluded from the systems or the office. Again, those are their positions in what may turn out to be another litigation (if it does not settle first).

35. There was a suggestion in a letter dated 20 October that the claimant would turn up for work on the 23 October. For reasons which nobody explained, he did not. Whether that was testing the waters with the solicitors, I have no idea.

36. During submissions I referred to the concept of garden leave as being analogous here. That is what happens when an employee is told to step back and not to be involved. The claimant also agreed, and it is a matter of record, that he would not compete with the respondent over this time. That is also consistent with his position in the contemplated unfair prejudice litigation.

37. I referred the parties latterly to the case of *Rigby v Ferodo* [1987] IRLR, 516, HL. This is an important case in the context of when there is no express agreement that pay will cease. The claimant may not have been working but he has nonetheless been on the payroll throughout. It appears to me that the situation here is indistinguishable from the reasoning in the *Ferodo* case. The case of *Rigby v Ferodo* involved a "cut" in pay, but it is established law that the payment of zero is still a "deduction" for the purposes of the Act. *Rigby v Ferodo* surprised the establishment at the time the judgment came out. It was felt surprising that someone could keep working with no overt protest for as long as 18 months on a reduced salary, and then sue successfully for the balance because there had been no agreement to a reduction and no express waiver of the right to full salary. This is a matter of hard dispassionate contract law in my view. It was disappointing to me that neither representative mentioned the *Ferodo* case, particularly Mr Lewis as it clearly helps his client.

38. I also pointed out to the parties that the understanding between them at the time that the claimant agreed to put his salary on hold was that Metro Bank had frozen the

account. That account was closed towards the end of September and the balance of £82,000 was transferred to Mr Mennie's personal business account which I described above. I do not know exactly when Mr Mennie paid himself some salary but he was paid some at some stage. He has paid tax and national insurance on it but the claimant never did.

39. At the time this salary was put on hold it was envisaged that the agreement would be completed in say 2 months and therefore as the claimant stated the odd £3,000 here or there would not have affected the overall agreement for sale of the shares, which was for more than 100 times that amount. I also stated to the parties, as it always was the intention of the agreement to settle these employment tribunal proceedings, the respondent may well receive credit in the spirit of that agreement for any amounts payable under this order of the tribunal.

40. Hopefully, the parties have now reached the last obstacle in the road on the way to this agreement being executed. Originally Mr Lewis said the claim was worth 14 months £3,000 which would have been £42,000. I consider, if the funds were unfrozen at the end of September, it should actually be 11 months to date, hence the award of £33,000 which is a net payment. In 2015 both parties apparently agreed to be paid a round £3,000 pm which would be grossed up to account for tax and national insurance.

41. With hindsight, as always, it would have been worth putting the share sale agreement in writing, but nobody envisaged it would go on for this long. The claimant did not refer the matter to ACAS for early conciliation until 1 December 2017. It was only in early conciliation for one day and the proceedings were presented at the ET on 4 December.

42. Mr Mennie stated that the claimant never said to him "where is my salary" but that is not the point, as *Rigby v Ferodo* emphasises. This is a dispassionate contractually based claim for arrears under Pt II of the Employment Rights Act 1996. Even though these directors did not have written contracts of employment employment / worker status has not been in dispute in this case. The claimant and Mr Mennie are exactly 50% shareholders. (It is hard to see therefore how the claimant could have been dismissed). He never agreed to be dismissed. Doubtless in the forthcoming agreement termination of employment will be one of the terms.

43. The claimant in the meantime has incorporated a new company and is working in recruitment now because he said he did not want to compete with the respondent. He informs the tribunal he has earned very little money.

Employment Judge Prichard

2 January 2019