Case No: 2202524/19

EMPLOYMENT TRIBUNALS

Claimant: **Mr. David Pardaillan**
Respondent: **Catalina and Co Ltd**

London Central remote hearing **On: 20 July 2020**
Before: **Employment Judge Goodman**

Representation
Claimant: **Mr M. Gardner, solicitor**
Respondent: **Ms Catalina Kim, director**

RESERVED JUDGMENT

1. The respondent made unlawful deductions from the claimant's pay, in the form of arrears of pay, holiday pay, and notice pay.

2. The respondent failed to comply with relevant parts of the ACAS Code and the award for unlawful deductions is increased by 20% for that.

3. The respondent is ordered to pay the claimant the total sum of £4,899.34.

4. The claim for overtime pay does not succeed.

REASONS

1. This is a claim for unpaid wages and notice pay following termination of the claimant's contract of employment with the respondent in March 2019.

2. The claim form outlines clams for basic salary, and in addition to that, payment of overtime, at a premium rate of twice the hourly rate for evenings and weekends. There are also claims for holiday pay and for notice, in that he had been dismissed with notice, but not paid it.

3. On the employer's response to the claim, it was asserted the claimant entitled to be paid for 16 days at £134.25 (£2,148), and denied that he was entitled to be paid overtime at any rate. As to the circumstances in which the contract was terminated, the employer asserted that he had decided to leave on 24 March, so that termination was by mutual consent, and that he had returned to work despite this on 25 March, when he had to be removed by security. If he had not wished to leave, he would have been dismissed for breach of contract because of his "terrible action on 24 March 2019", adding that he had possible illness, "serious paranoid", and it was unsafe working with him. Finally, there was a statement that he had fabricated the fact found sheet on 4 March 2019 (amended in evidence by Ms Kim to 12 March).

4. As clarified at the start of the hearing, the issues in this case are:

   (1) whether the respondent is entitled to withhold payment of wages because the contract was conditional on verification of the employee's CV.
   (2) whether the claimant was entitled to be paid overtime for work over his contracted hours, and if yes, at what rate?
   (3) whether the contract was terminated by the respondent or "withdrawn" by the respondent, or the employee resigned.
   (4) If terminated by the employer, was the claimant in repudiatory breach of a term of the contract entitling the employer to terminate it without notice.
   (5) If the tribunal makes an award in either claim, is it just and equitable to increase it because of any failure to observe the ACAS Code on Discipline and Grievance.

Conduct of the Hearing

5. The case was listed for a hearing on 24 January 2020, but at the respondent's request this was postponed to 30 April. This was converted to a remote (Skype) case management hearing because the building was closed for Covid-19, and remote public hearings were not yet possible. The respondent asked to postpone this case management hearing, first because she was in South Korea, then, when refused, because she had been injured in a car accident. The hearing was listed for 24 June, then postponed to today, after expiry of the respondent's medical certificate.

6. The respondent explained she could not sit for long periods because of the injury, and it was agreed she should ask for a break whenever necessary. The lunch adjournment was kept to 30 minutes because of the late hour in Korea. The hearing ended at 2.10 pm, when judgment was reserved.

Evidence

7. Oral evidence was given by the claimant, David Pardaillan, by a fellow employee, Harry Phillips, and by Ms Nana Catalina Kim, who is sole director of the respondent, and made the decisions to end the contract and not to pay. I was provided with written witness statements for each witness.

8. I also had two witness statements for another employee, Ms Munju Bae, one statement dated 28 October 2019, the date the employer's response to the claim was filed, the other dated 13 July 2020. Ms Bae did not participate in the hearing. Ms Kim said she did not know that it was necessary to call a witness for questioning, and when asked if she could arrange her attendance later in the day, said Ms Bae was flying from Seoul to London today. I have read these two witness statements, and considered what is said in the light of the evidence of other witnesses and the contemporary documents.

9. There were also some relevant documents: the contract of employment, the fact sheet said to have been fabricated, the termination email and the claimant's response, some post-termination emails from the claimant's legal representatives, and the claim form and response.

10. Ms Kim's witness statement in substance covers only the fact sheet issue, and is silent on the events of 24 or 25 March 2020.

11. Ms Kim gave evidence through a Korean interpreter and all the proceedings were translated into Korean throughout. Ms Kim appeared to understand English, as was clear when from time to time she corrected the interpretation of a word (for example, that 'dismissal' should have been translated as 'withdrawal'), and her email correspondence with the claimant and the tribunal has been in English, and the

language of the workplace was English, but it is understandable that in an oral court hearing she would not wish to risk any misunderstanding through unfamiliar vocabulary or a formal setting.

Findings of Fact

12. The respondent is a small business, and at the time of these events four people, the claimant, Harry Phillips, Munju Bae and Ms Kim, the sole director, worked in the office in London.

13. The claimant was taken on following an interview and started work on 27 February. The contract was signed on 24 February 2019.
14. The relevant terms as to notice are in paragraphs 3 and 47. Paragraph 3 says: "at any time during the probationary period, as and where permitted by law, the employer will have the right to terminate employment with 2 weeks notice".

15. Paragraph 47 says: "where the employee has breached any reasonable term of this agreement or where there is just cause for termination, the employer may terminate the employee's employment without notice, as permitted by law".

16. Paragraph 49 adds that if the employee wishes to terminate the employment, he must give 8 weeks' notice, which may be cut back if he cooperates with the training and development of a replacement.

17. Paragraph 15 provides the normal hours of work are 8.30 to 5.30, "and some hours depending on demand". Paragraph 16 states: "however, the employee will, on receiving reasonable notice from the employer, work additional hours and/or hours outside of the employee's normal hours work as deemed necessary by the employer to meet the business needs of the employer."

18. The term as to payment is set out in paragraph 8. He was to receive "annual salary of £35,000 plus commission of 4% from the monies of the company received from the concluded deals by the employee". Nothing is said about payment for any hours required under paragraph 16.

19. On starting work the claimant was asked to provide payroll documentation and a completed fact sheet within 5 working days. On 11 March he was chased on this, on 12 March he did provide it. The fact sheet is the job application form. It contains handwritten answers to printed questions about his employment and education history, his right to work in the UK and contact details, and concludes with a signed declaration about the Data Protection Act and that the information is accurate and that if any of it "is later found to be false or misleading, any offer of employment may be withdrawn or employment terminated". The form is dated 4 March, although not submitted until 12 March; the explanation for that seems to be that the claimant needed to find documents at home, and that week had been working till 10 pm most nights and did not have time.

20. The respondent did not question anything in the fact sheet until after the employment terminated. It is not in fact known when she did check the fact sheet. The matter was not raised with the claimant or his solicitors until she filed the response to the tribunal claim in October 2019, with its final sentence that it was false. When asked in evidence when she had learned that there was anything false about the fact sheet, she did not answer that question.

21. Asked to put to the claimant what was false about it, Ms Kim said that none of the institutions of higher education the claimant said he had attended existed, and that his former employer, MBO, did not exist either. In the witness statement Ms Kim had only stated: "none of the education or work history turned out to be true", without

giving detail, adding that she had learned this "a few months ago". The claimant in evidence asserted he *had* worked for MBO, and produced his business card. As for the educational institutions, the fact sheet refers to having been educated at "Sciences Po", which is one of the elite French "grandes ecoles", higher education institutions. It may or may not be the case that the claimant attended this institution, but it cannot be said that it does not exist. Further, being without notice of the need to verify any, let alone every single, entry on the fact sheet, he cannot be reproached for not providing documentary evidence of his degrees or work history. The tribunal is not able to find on the evidence that the fact sheet was false in any respect.

22. The fact sheet stated that the claimant could not work on Saturdays or Sundays. In evidence he said this was because these were the days of access to his child, who lived with the mother. The claimant worked both days of the first weekend in March, but not the next two.

23. The claimant continued to work as requested, including outside the contracted hours. For much of this time he used his private email address, a company email address having not yet been set up. This may account for the respondent finding after he left that only four emails had been sent to external parties.

24. On the evening of Friday 22 March, the claimant and Harry Phillips were both asked to come into the office on Sunday for a couple of hours. Mr Phillips's unchallenged evidence of events that day was that Ms Kim was in a bad temper. He also said Ms Bae told him when Ms Kim was out of the room that Ms Kim was going to dismiss one of them. His evidence was that he and the claimant were given a series of small tasks, all of which could in his opinion have been done from home, and that after three hours the claimant asked Ms Bae, in Mr Phillips's presence and Ms Kim's absence, if there was more to do, was told no, and left at 7p.m. Mr Phillips left an hour or two later. Mr Phillips denies any violence or aggression being offered to Ms Bae, and says she laughed after he left, as it seemed to her that the claimant would be the one to lose his job.

25. Ms Bae's account of that Sunday is that the claimant came to work that day angry for personal reasons, and expressed himself aggressively, and when Ms Kim was out of the room "he came towards me and got violent with me", saying "this workplace isn't sensible so he will not continue to work here", and that, "after the incident I immediately reported to the company about his violent acts and words". She said she felt terrified to be in the same room with him, especially when other people could be absent for short calls.

26. In answer to a question, Ms Kim said that she had been messaged by Ms Bae, but she did not indicate when this message said, and the message has not been disclosed in the exchange of documents. In answer to a question as to what the 'violent act' (as stated in ET3) was, she said he had sworn and banged his hand on the desk shared by Ms Bae and Mr Phillips.

27. That evening Ms Kim emailed the claimant terminating his employment. The email said:

> "Dear David, thank you for your work last few weeks. Unfortunately, I decided to terminate your probation to end the contract with our company. Please take this email as the notice of termination and you have 2 weeks window to finish things though I am also opened to discuss immediate termination if you wish to move on straightaway. Please let me know which date you prefer to be your last day. Thank you. Kind regards, Catalina."

28. Next morning, 25 March, the claimant opened this email at work and replied:

> "Dear Catalina, I hereby acknowledge receipt of your notice of termination. As stated in the contract, there is a 2 weeks' notice which are the terms I accept. Also, you will find below the detailed account of all the additional hours that I've done every day since I started working in this company…"

Then he listed his working time and the extra hours for all weekdays and weekends for every day from 27 February, including when there no work done on any day. This shows one weekend worked, and regular weekday working until19.30 in one week, or 22.00 in another. It came to 52 additional hours, and he concluded:

> "we still have to negotiate at what extra rate you will pay me those additional hours. Please let me know what you propose as soon as possible. Best regards, David Pardaillan".

29. There was no reply to this email, then or later. The claimant's evidence is that on reading this Ms Kim became "visibly irate". Mr Phillips, who was there, said there was "a brief exchange of words with respondent concerning what I understood to be the notice period and the payment of the extra hours that he had worked. The Respondent quickly became very irate and was shouting at David and told him to leave, to which the claimant said he was not leaving voluntarily, and he was not abandoning his workplace". Ms Kim's only evidence on this was: "I have also experienced his violence on the following day so the building security was engaged for the release", confirmed also by Ms Bae in her second witness statement. Mr Phillips denies there was any aggression or violence on 25 March, and that he shook the claimant's hand and wished him goodbye as he was escorted out. Following that, Ms Kim informed him (Mr Phillips) that the claimant had threatened Munju Bae the day before, and to this Phillips replied that he had witnessed interactions and did not hear any threats.

30. The claimant was due to be paid at the end of March. In the event he was not paid. It is common ground the claimant has not been paid wages for any date that he worked for the respondent, even the amount admitted in the ET3 response. The respondent did not reply to pre-action letters from the claimant's solicitor, or engage in conciliation through ACAS, in the interval between the termination and the claim being presented to the tribunal on 1 July 2019. After that, she filed the ET3 on 28 October 2019, and requested a postponement of the January hearing.

Relevant Law

31. Was there a lawful contract under which the claimant worked? The respondent has not made its legal case clear, but it seems it be that the contract was based on a misrepresentation by the claimant and so was void ab initio. Leaving aside that there is no counterclaim to this effect, on the facts, the respondent has not established that there was any misrepresentation by the claimant, let alone one that was material. She was not able to substantiate her sweeping condemnation of the fact sheet as "fake". In effect, she required the claimant to prove it was all true, not that she should establish some falsity with which to justify a failure to pay.

32. The respondent argued that the employment was withdrawn, a word taken from the declaration on the fact sheet. An offer of employment, once accepted, as indicated by the claimant starting and continuing to work, cannot be withdrawn. There has been offer and acceptance, consideration and intention to enter into contractual relations, the elements of a contract, written or not. The fact sheet provides that in the alternative that if found false the employment may be terminated. This is what would have happened if any material falsity had been discovered. It was not, on the evidence, the reason for termination.

33. It is noted that the respondent does not argue that the claimant was not competent to do the work he did, or that there was any lack of capability.

34. Even supposing there was some misrepresentation, he did the work, and she was satisfied with it, and he should he paid for it whether under the contract or not. The Employment Rights Act defines wages (from which unlawful deductions must not be made) in section 27(1) (a) as "any fee, bonus, commission, holiday pay or other emolument referable to his employment, whether payable under his contract or otherwise".

35. Claims for unlawful deductions from wages are brought under the Employment Rights Act 1996 which in section 13 defines a deduction as the difference between wages "properly payable", and the amount actually paid. Lawful deductions are those which have been previously notified in writing to the employee, whether in a provision of the contract, or a separate document. It is not argued here that the employee was notified of any deduction to be made from his pay.

36. What wages were "properly payable"? Was it the annual rate, the express term of the contract, or was there also a right to be paid for hours worked over his contracted working hours? The respondent's answer to questions about remuneration for extra hours was that employees expected to be rewarded by commission when deals were done.

37. There was no express term of this contract that payment was to be made for hours worked outside normal working time. It is possible that an agreement might be implied that where the employer required additional hours to be worked, they were to be paid in addition, even though the contract is silent- as discussed in **Driver v Air India Ltd, (2011) EWCA Civ 830**. Neither side has given any evidence of this being discussed, whether at the interview or subsequently. Looking at the working pattern, in the first week the claimant sometimes started at 3pm and worked on into the evening. More often he worked from 8:30am till 7:30 pm. In white-collar salaried jobs paid voluntary overtime is unusual. Compulsory overtime, as this contract requires from time to time, is less usual, and a presumption might arise that it will be remunerated, but even in contracts expecting overtime as required, it is remunerated by higher salary or a bonus. Here, the 4% commission on completed deals is likely to be the remuneration for this extra effort. In the absence of any information about industry practice, or any discussion of payment for additional hours until termination, there is no evidence from which a term for paid overtime can be implied. In some workplaces, there is provision for time off in lieu of overtime. There is no evidence that this was ever discussed.

38. Still less is there any reason to imply a term that if overtime was worked it would be at double the hourly rate. Premium rates often vary from workplace to workplace, often vary depending on when the work was done, are always negotiated, and in the absence of any evidence of a concluded agreement, if a term that overtime was to be paid *was* implied, it would have to be implied at the ordinary rate.

39. In conclusion, the claimant was to be paid £35,000 per annum, so a week's pay is £673.07.

40. There is a claim for holiday pay. Under the Working Time Regulations, the claimant is entitled to 28 days per annum, 2.33 days per month, accruing pro rata and payable on termination if not taken.

41. From Wednesday 27 February to Monday 25 March is 4 weeks less one day. Adding the holiday entitlement, he is entitled to 4 weeks' pay plus 1.33 days. Calculating a day's pay at one fifth of the weekly rate, the amount due is £2,871.31. The respondent is ordered to pay the gross sum, which will be taxable in the claimant's

hands. There is no evidence the respondent had registered a PAYE account for the claimant with HMRC, and it will be taxable on 2020/2021 receipts and allowances, not on any tax coding she may have had in February 2019.

Notice Pay

42. By contract the employer had to give 2 weeks' notice of termination unless the claimant's conduct was repudiatory, justifying immediate dismissal. Whether there was gross (i.e. repudiatory) conduct is an objective question of fact to be judged by the tribunal, not by examining the employer's reasons.

43. It was suggested, but not seriously pursued by the respondent, that the claimant resigned. There is no evidence of such words or actions, at most it may be supposed that he indicated he was not staying any longer on a Sunday if there was nothing much to do; in any case, if he did resign on 24 March the respondent has not explained why she proceeded to dismiss him on notice that evening. In the light of this termination email it is wholly improbable that she did not expect him to attend work next morning.

44. There was a termination by the employer. Was this on 24 March, on notice, or on 25 March, by asking him to leave the premises? The respondent's case for dismissal without notice rests on the "violent act" towards Ms. Bae on 24 March. In the finding of the tribunal, there was no conduct on the part of the claimant justifying dismissal. He may been dissatisfied or irritated at being kept at work on a Sunday when the tasks appeared unimportant and he had expressly stated he was not available that day, but the evidence of Mr Phillips, and the evidence of the termination email that evening do not support a finding that Ms Bae was sworn at or put in fear. If this had happened it is inconceivable that the claimant would have been asked to work for the next two weeks, sharing office space with Ms Bae. Ms Bae's statements are silent on the events of Monday. Ms Kim said that it was on the Monday morning that, "I also experienced his violence on the following day so the building security was engaged for the release". There was however no description of the claimant's violence from her, or Mr Phillips, nor was any account put to the claimant. The tribunal concludes simply that the morning was calm until the claimant had composed and sent his list of dates and working hours and asked for overtime payment; it was in response to this that she lost patience and called security.

45. On these findings on the evidence, there was no conduct justifying dismissal without notice. The claimant is entitled to the balance of the two weeks after 25 March, which is 1.8 x £ 673.07, making £1,211.52.

ACAS Code – Increase in Award

46. The Trade Union and Labour Relations (Consolidation) Act 1992 provides at section 207A that in proceedings before an employment tribunal relating to a claim in schedule A2, where:

> "it appears to the employment tribunal that – (a) the claim to which the proceedings relate concerns a matter to which a relevant code of practice applies (b) the employer has failed to comply with that Code in relation to that matter and (c) that failure was unreasonable, the employment tribunal may, as it considers it just and equitable in all circumstances to do so, increasing any award it makes to the employee by no more than 25%".

47. Schedule A2 lists the relevant claims, which include claims under section 23 of the Employment Rights Act 1996 for unlawful deductions, which will include, the present claims for unpaid arrears, holiday pay, and notice.

48. The statutory ACAS code on discipline and grievance provides guidance to

employers, and states:

"Employment tribunals will take the size and resources of an employer into account when deciding on relevant cases and it may sometimes not be practicable for all employers to take all of the steps set out in this Code.
That said, whenever a disciplinary or grievance process is being followed it is important to deal with issues fairly. There are a number of elements to this:
Employers and employees should raise and deal with issues promptly and should not unreasonably delay meetings, decisions or confirmation of those decisions.
Employers and employees should act consistently.
Employers should carry out any necessary investigations, to establish the facts of the case.
Employers should inform employees of the basis of the problem and give them an opportunity to put their case in response before any decisions are made.
Employers should allow employees to be accompanied at any formal disciplinary or grievance meeting.
Employers should allow an employee to appeal against any formal decision made".

49. This was a small employer, and a degree of informality is appropriate. In respect of discipline, if the respondent did believe there was misconduct, Ms Kim took no steps whatsoever to investigate it, nor did she even tell the claimant what it was. That said, the tribunal does not hold Ms Kim did believe this. The allegation was made much later, on the basis of an exaggeration, perhaps even misrepresentation, of what Ms Bae may have said (bearing in mind Ms Bae's message is undisclosed) of what occurred on Sunday, and on Ms Kim's own account, which is not accepted, of events on Monday. It would be artificial to expect her to investigate a matter she did not believe had occurred. In relation to grievance, the claim ant had a grievance, justified or not, about working overtime without pay. He also had a grievance, wholly justified, about not being paid for his work in March, and another for the unpaid notice period, no reason being given for not paying it. It was articulated by his representatives in emails in May and June. The respondent has given no explanation why the grievance went unanswered, or even why the claimant has had to go a tribunal to e aid even the sums she admitted in the response. She was injured in a road accident earlier this year for which she underwent surgery some weeks ago, but that was over 9 months after the failure to pay.

50. The company was first registered in October 2015. Ms. Kim is UK resident, her occupation is stated at Companies House to be entrepreneur. The contract of employment is a sophisticated document, not a basic statement of terms and conditions. There are other businesses in Dublin and Seoul. ACAS Codes are written in accessible language and available on the web. This may have been a small employer, but she should have known about basic employment requirements and procedures, at least in outline.

51. In the light of this the tribunal concludes that there was delay, contrary to the Code requiring grievances to be handled without delay – meaning no action was taken at all to respond to the claimant or his representative until required to file ET3 or risk judgment being entered. If there was a dispute about the claimant's conduct and his notice pay, he was entitled to know that. He was entitled to be told the respondent's case on the overtime claim – a short email would have sufficed. He was entitled to be paid arrears of pay, and no explanation was ever forthcoming, until Ms Kim's recent witness statement was served. It may not have been necessary to hold a meeting when he was no longer employed, but an answer was required. These failures to answer are unreasonable, meaning there is no reason for them. Not paying him for work he had done, a claim not disputed, looks like plain spite.

52. The claimant meanwhile has been out of his money for 16 months. The Code was devised to encourage employers and employees to resolve disputes, preferably while still employed, without recourse to tribunal proceedings. It is just and equitable

to make some increase. Giving the respondent some allowance for being a small employer, and the lack of any other mitigating factor, the tribunal considers 20% uplift the right award.

Conclusion

53. Adding the amounts ordered in paragraphs 41 and 45, the award for unlawful deductions is £4,082.83. Increasing that by 20% gives a total award of £4,899.34.

EMPLOYMENT JUDGE - Goodman

Date : 21/07/2020_

JUDGMENT SENT TO THE PARTIES ON

22/07/2020..

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FOR THE TRIBUNAL OFFICE