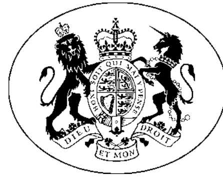

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr A Dobbie	v	**Paula Felton t/a Felton Solicitors**

Heard at: London Central (by cloud video platform)

On: 2 and 3 December 2020

In Chambers: 4 December 2020

Before: Employment Judge Elliott

Appearances:

For the Claimant **Ms A Ohringer, counsel**

For the Respondent: **Ms S Chan, counsel**

RESERVED JUDGMENT

The judgment of the tribunal is that the claim for unlawful deductions from wages succeeds in part and will proceed to a remedy hearing if remedy is not agreed.

REASONS

1. This is the last part of the determination of a claim which was originally presented in the London South Employment Tribunal on 21 July 2016. It came before me for case management in 2017. The claim was for automatically unfair dismissal for whistleblowing and whistleblowing detriment plus unlawful deductions from wages.

2. The whistleblowing claim was heard by Employment Judge Gordon, Mr J Walsh and Mr S Godecharle in June 2019. The case has a very long procedural history going back four and a half years. The background is not recited here but is set out in the case management orders and decisions which precede it.

3. The claimant is a solicitor and is called to the bar and is a non-practising barrister. The respondent operates as a firm of solicitors.

Remote hearing

4. The hearing was a remote public hearing, conducted using the cloud video platform (CVP) under Rule 46. The tribunal considered it as just and equitable to conduct the hearing in this way particularly because the claimant was at the time in Austria with childcare responsibilities. The respondent initially agreed to a remote hearing although on 24 November 2020 suggested that it should be postponed. After 4.5 years of litigation I considered that it was in the interests of justice for this case to be concluded and not further postponed and I refused this application. There was a further application during the hearing which is dealt with below.

5. In accordance with Rule 46, the tribunal ensured that members of the public could attended and observe the hearing. This was done via a notice published on Courtserve.net. No members of the public attended.

6. The parties were able to hear what the tribunal heard. As with most CVP hearings there were some technical difficulties, most of which were solved by the relevant participant logging off and logging back on again or by asking the person speaking to repeat what they had said.

7. The participants were told that is was an offence to record the proceedings.

8. The tribunal ensured that each of the witnesses, who were all in different locations, had access to the relevant materials. I was satisfied that none of the witnesses was being coached or assisted by any unseen third party while giving their evidence.

The issues

9. The issue for this hearing for the claim for unlawful deductions from wages were identified in case management before Employment Judge Gordon on 28 June 2019 as follows:

10. <u>In relation to client A,</u> whether it was agreed between the parties on 19 January 2016 in Richmond that the claimant would be paid £10,000 per month for January and February 2016 for his work for this client instead of £5,000 per month.

11. Also for this client, whether the claimant is entitled to payment under his consultancy agreement in respect of the interim bills paid by client A in 2016 or whether the respondent is entitled to refuse or reduce the amount paid to the claimant on the basis that the claimant did no or little work of value in January or February 2016 and if so whether it is true that the claimant did no or little work of value in January or February 2016.

12. <u>In relation to client WK,</u> the claims were for £4,000 and £2,000 and whether the claimant has been paid this amount by the respondent. During the hearing the claimant said that only the sum of £4,000 was pursued.

13. In relation to client M, whether this was partially paid by a payment of £556.75 by the respondent and whether the remainder is due (the respondent saying that there are no fees owing because the claimant did not do all the work on this file).

14. In relation to client U, the claim for £300, whether client U paid this amount to the respondent. And in the first and second claims for £800 whether work on this file in relation to this fee was done by the claimant?

15. In relation to client FE, in the claim for £250 whether the claimant has been paid this amount by the respondent.

16. If the tribunal makes an award for unauthorised deductions from wages, whether the tribunal should also award an amount under section 24(2) of the Employment Rights Act 1996 as compensation for financial loss.

Witnesses and documents

17. The tribunal heard from three witnesses: the claimant Mr Dobbie, a former client of the respondent firm (from client U) Mr Rupert Wertheimer who was called by the claimant and from the respondent Ms Felton. The pages numbers in the witness statements did not tally with the bundles prepared for this hearing and the respondent had used exhibits rather than paginating and giving an index. This made it hard to navigate the documents.

18. There was a pleadings bundle of 197 pages from the claimant. There were two further bundles from the respondent. A statement with “appendices” or exhibits running to 156 pages and another bundle of 140 pages which appeared to be pages 492 to 630 of an earlier hearing bundle. Regrettably there was no jointly agreed concise bundle prepared for this hearing. Other bundles were sent after the time limit imposed by the tribunal of midday on 1 December 2020. It made navigation of documents difficult as there were a number of separate bundles with duplication. It was regrettable that the parties, who are solicitors, with knowledge of what is required for a hearing, could not cooperate to put together a workable bundle. The tribunal was greatly assisted by counsel who were able to take the tribunal to the relevant documents.

19. There was a helpful six page opening note prepared by counsel for the respondent which counsel for the claimant agreed would assist the tribunal.

20. Where page numbers are referred to below the reference is to the electronic page in the bundle for this hearing. There were a number of separate electronic bundles. Some pages had up to three page numbers written on them, due to being included in separate bundles for different hearings over the course of this litigation.

21. I had written submissions from both counsel which are not replicated here to which counsel spoke. The submissions were fully considered even if not expressly referred to below.

The respondent's postponement application

22. The respondent sought a postponement of this hearing firstly on the basis of the technical problems experienced at the tribunal's end with the Judge initially only being able to access one screen and also due to the claimant submitting more documents after midday on 1 December. The respondent suggested that she would be disadvantaged by being cross examined "at length" on these multiple documents. Ms Felton has made numerous postponement requests during the course of these proceedings and most recently on 24 November 2020 had asked for a postponement of this hearing which was refused.

23. Mr Ohringer for the claimant confirmed that he did not intend to cross examine "at length" and both parties agreed that there was not a great number of documents that the tribunal needed to be taken to. Both counsel initially thought that the case might be completed in 1 day rather than 2 days. After 4.5 years of litigation in this case I considered it unlikely that there were documents that the parties had not seen before. This was not the disclosure exercise but the compilation of the bundle. The respondent wanted a postponement so that there could be an in person hearing with a slimmed down bundle.

24. Mr Ohringher made the submission, with which I agreed, that the preparation of this case was not going to improve with time. I saw the comments of the previous tribunal in relation to the hearing in June 2019 (Reasons paragraphs 7 and 8) as to the disarray concerning the documents. I urged the respondent to consider the advantage of concluding this hearing without taking this litigation into another year and with it remaining over the parties' heads and the inevitable stress that this caused. I gave a further break for instructions to be taken. The respondent pursued the application for a postponement.

25. I considered that both parties were represented by experienced counsel who cooperated well together and that I could be taken to the right documents at the right time. These documents were unlikely to be new to the respondent but if they were, she could have a break to consider any document and instruct her counsel. The issues for this hearing had been clear since June 2019. The parties have had a year and a half to prepare. There was not going to be lengthy cross examination and I agreed with Mr Ohringer, based on the history of the case, that the preparation of this case was not going to improve with more time.

26. For the above reasons the respondent's postponement application was refused.

Findings of fact

27. Where findings of fact have been made by the tribunal which heard the whistleblowing claim in June 2019 impact upon the issue of unlawful deductions from wages, I considered this tribunal to be bound by those findings. This was a ten day hearing before a three person tribunal.

28. The consultancy agreement between the parties dated 6 March 2014 set out the following terms as to payment (respondent's bundle page 26):

"3. Remuneration
The Consultant shall be paid a consultancy fee of 40% of the fees billed which have been paid and received by the Practice net of VAT and disbursements on receipt of an appropriate invoice which shall be rendered at the end of each month by the Consultant. Where the Consultant has introduced the client to Feltons the consultancy fee shall be 50%. The Practice will pay the Consultant within 30 days of receipt payment from the Client…

4. Expenses
The Company shall repay to the Consultant out of pocket expenses pre authorized by the Practice and reasonably and necessarily incurred by the Consultant in the performance of the consultant's duties upon suitable evidence of such expenditure being provided to the Practice…"

29. Clause 5 dealt with the performance of duties and said that the consultant should perform his duties in a good, efficient and proper manner consistent with the standards expected of a professional person.

For client A

30. Client A was a major client of the respondent firm and I relied on and adopt the findings of the tribunal chaired by Employment Judge Gordon at paragraph 22 on this point. There was a separate arrangement for the claimant in relation to his work for this client. It was not in dispute that it was initially agreed that the claimant would be paid for working on this client's case at the rate of £5,000 per month, on the basis that he was doing at least 50 hours a month for that client. The respondent says that this was on the "*understanding*" that a costs draftsman would look at work billed to the client at the conclusion of the case and if the work done did not justify the hours billed, and adjustment would be made. I saw no such agreement between the claimant and respondent to this effect.

31. I was taken to an email of 9 September 2015 from the respondent to client A. It appeared to have been copied to the claimant although he could not recall it. It discussed the billing arrangements for client A. In this email the respondent said: "*I will also need to discuss our costs on account arrangement with file costing at the end of the matter and balancing off…as you know, the payments on account are being and will be billed and transferred and of course if there is any overpayment then this will be returned but given the intensity of my time and the work ahead this may be unlikely".* The respondent's case is that this was what was agreed with the client and the claimant knew about it.

32. I find on a balance of probabilities that as the 9 September 2015 email purports on the face of it, to have been copied to the claimant, he received it, even though he does not recall it. This is an email setting out an agreement between the respondent and client A. It is not a contractual agreement between the respondent and the claimant and I have seen no evidence to support the contention that there was an agreement that the fees due to the claimant were subject to assessment, balancing off or reduction at the completion of the case for client A. On my finding there was no such agreement between the claimant and the respondent. There was also no other contractual agreement between the claimant and respondent, whether in the 6 March 2014 agreement or otherwise, for clawback of fees payable to him, in any circumstances.

33. The respondent was unhappy with the standard of the claimant's work for client A. For example is not in dispute between the parties that errors were made by the claimant in issuing proceedings in the High Court. The proceedings had to be reissued and reserved.

34. The respondent instructed a costs draftsman from a firm called Alternative Costs. This was not at the conclusion of the case for client A. The respondent confirmed in evidence and I find that the litigation for client A ended in October 2016. The costs draftsman was instructed and did the work on a precedent H in September 2016. This was before the end of the case. I find that the costs draftsman was instructed to prepare the precedent H in connection with that litigation before it had concluded. I saw no instructions otherwise to the costs draftsman.

35. The costs draftsman took the view that the work done by the claimant was no more than 320 hours. The respondent calculated that she had paid him under the fixed fee arrangement for this client for 860 hours. The claimant was not given any opportunity to comment on this. The respondent chose not to ask him because he had left the firm, although she could have done. The respondent's position was that the claimant had been overpaid. In the respondent's view, the claimant had done nothing to progress the case, he duplicated work and she received complaints from the client. Her oral evidence to the tribunal was that the claimant "*did the work, but it was not of any value*".

36. I find that the respondent had performance issues with the claimant's work. He did the work but it was not to the standard required by the respondent and that these issues were not dealt with in any supervision by the respondent. I find based on the respondent's oral evidence that he did the work on the matter but not to the standard the respondent required. The respondent spent a great deal of time working on the client A matter herself as a result.

37. It was also an issue as to whether it was agreed between the parties on the evening of 19 January 2016 at the Regus offices in Richmond, that the claimant would be paid £10,000 per month for January and February 2016 for his work for client A instead of £5,000 per month as initially agreed.

38. The respondent accepted that on 21 December 2015 the claimant emailed her (her bundle page 83) saying that his work for this client was increasing and he wanted to review the "*workload we are billing for in terms of my time".* On 12 January 2016 he emailed the respondent to ask if she was ok with him suggesting a "*higher monthly block*" to this client and asked for her views (her bundle page 67).

39. The respondent accepted in her statement, paragraph 21, that the claimant was "*pressing her to show more hours and double his fee on account to £10,000 per month*" but she was adamant that she did not agree to this.

40. I find on a balance of probabilities that there was no such agreement between the parties to double the claimant's monthly fee for client A for the following reasons: (a) the respondent was dissatisfied with the standard of the claimant's work including the problem with the issue of the High Court proceedings for that client; (b) there is no written record of any such agreement - clause 14 of the Consultancy

Agreement of 6 March 2014 states that the agreement "*shall only be capable of being varied by a supplemental agreement in writing signed by or on behalf of the parties hereto*". The claimant is a solicitor and understands the importance of a written record of an agreement, particularly one that is as important to him as his pay. It was a simple enough matter, had there been such an agreement, for him to send an email shortly after the meeting to say "*This is to confirm our agreement on 19 January 2016 that my fee for client A will be increased to £10,000 per month*" and (c) I am supported in my findings by the findings at paragraph 54 of the Judgment of the three-person tribunal chaired by Judge Gordon.

41. It is not disputed by the respondent and I find that when the claimant came to invoice the respondent at the higher rate of £10,000 she did not challenge it at the time. She simply told him that his invoices were "*wrong*" without saying what exactly was wrong. I find that the respondent was under a huge amount of pressure at the time and felt that she was being "*bombarded*" with invoices from the claimant and that she did not challenge it at the time because of the pressure she was under. Nevertheless, I find as a fact that there was no agreement that the claimant's fees for client A were to increase to £10,000 per month for January and February 2016.

<u>For client WK</u>

42. It was said by the respondent in closing submissions that this was not originally part of the claim but had been added during case management hearings. It has been part of the list of issues since July 2019 and I considered that if there was a question over whether this was properly included, it should have been raised in the last 18 months and not in closing submissions so that the tribunal would consider it.

43. The claimant confirmed during this hearing that the sum he claimed was limited to £4,000 and not an additional £2,000. The invoice was at page 64-65 of the claimant's bundle and referred to at paragraph 22 of his witness statement. Pages 524-528 of the claimant's bundle showed documents from client WK confirming that this client had paid the respondent firm for the work done by the claimant.

44. The respondent's case was that the claimant had been overpaid by £2,483.13 in relation to this client. In a Schedule of Payments made by the respondent to the claimant (a document prepared by the respondent) there were five separate sums paid to the claimant which the respondent attributed to client WK, totalling £8,438.13. The respondent said that the claimant was paid everything he was due and that the post termination payments in April 2016 meant that he had been fully paid, if not overpaid. The problem for the respondent was that she had not sought to show how those payments had been allocated.

45. The claimant did not dispute the accuracy of the statement of payments but he did not know how the payments had been allocated. The schedule of payments on five dates relied upon by the respondent as relating to WK said "*A Dobbie consultant fee (ref on A/c AL)".*

46. I find that there is no dispute on the entitlement to £4,000 and this is the amount to which the claimant is entitled in respect of client WK because he did the work and the respondent firm was paid. Credit must be given for sums paid by the respondent and this is referred to in more detail below.

For client M

47. This related to work done by the claimant on the extension of a commercial lease. For this client the issue was whether the claimant was partially paid with a payment of £556.75 and whether the remainder was due. The respondent said that there were no fees owing because the claimant did not do all the work on the file. There was a witness statement from a Mr B of the client confirming that the client had paid and this did not appear in dispute.

48. The sum in issue was £906. There were some problems with the transaction which had to be resolved with the client. In the course of the transaction the fees were negotiated with the client. The client was unhappy and a reduced fee was agreed and the claimant was entitled to 40% of that. The respondent accepts that £906 was the correct fee at 40% to which the claimant would be entitled had all been well and that she paid £556.75 in April 2016. She says she had to spend 2 hours doing some remedial work on the case.

49. The parties agreed that £906 was the correct sum due to the claimant but it was reduced by the respondent because there was a client complaint and she had to carry out work to deal with this. She therefore reduced the amount she was prepared to pay to the claimant and paid him £556.75 in April 2016. I refer in the conclusions below to the claimant's entitlement in this matter.

For client U

50. For client U, there were three amounts claimed. The first was for £300 for a matter called 1 USQ and the second and third payments were both for £800 for 25 O Square and 81 O Square. In the claimant's bundle at pages 145 and 146 were the invoices from the respondent firm to the client U in December 2015. Client U is a property management company that had consistent and ongoing work with the respondent.

51. It was the respondent's case that the claimant did not do the work and that it was done much later by the respondent and Ms Duncan long after the claimant left. The tribunal was taken in one of the respondent's bundles to invoices in November 2016 which had titles that corresponded with the properties in question and billed for work after the claimant left. The December 2015 invoices said that they were for money on account, although VAT had been charged.

52. The claimant said that for this client, issues arose three or four times a year which involved work for that client. He recalled issues relating to a car park and to the Right To Manage for the building. The respondent said that he did very little work and/or that he did not do work of any substance and/or that it was she and Ms Duncan who did the work based on the November 2016 invoices.

53. The tribunal heard from Mr Rupert Wertheimer who was a property manager at client U until either mid-March or mid-April 2016, he could not recall which date. His evidence was that the claimant worked for client U on litigation related to 81 O Square and the other matters. Although Mr Wertheimer's recall was not detailed, he was satisfied that the claimant acted for him on more than one occasion. He was the manager responsible for paying the respondent firm's invoices and he said at the date of his departure it was all paid up to date.

54. He was asked about the reference to "money on account" on the December 2015 invoices and what this meant. He said that it meant on account for work that was pending, but that the work "*could have been in hand already*" because the disputes referred to in the invoices were ongoing for some time. He recalled in relation to one of the matters it was a dispute that started in 2009 and only settled this year (2020). For the other matter of 81 O Square Mr Wertheimer said that this had been dealt with and closed off before he left in March or April 2016.

55. Based on the claimant's evidence that he did work for client U and this was corroborated by Mr Wertheimer, I find that the claimant did work for that client. I do not accept the respondent's evidence that he did very little work or no work of any substance. This is not supported by Mr Wertheimer who was also the manager responsible for paying the respondent firm's fees. His evidence, which I had no reason to doubt, was that the respondent was paid up to date by the time that he left and that the matter of 81 O Square had been dealt with and closed off before he left.

56. In the Schedule of Wages claimed, which was in one of the respondent's bundles with the respondent's comments, it was accepted that the respondent has been paid by client U for the work on these matters. She says that it was billed against money taken on account so I find that on all three matters the client has paid the respondent.

57. I find that in relation to the work on 81 O Square, based on Mr Wertheimer's evidence that this was all done and closed off before he left and that he was responsible for paying the respondent, that the requirements for payment under the Consultancy Agreement are met for this matter of £800.

58. Based on Mr Wertheimer's evidence with his confirmation that invoices referring to money on account was for work pending and his lack of confirmation that the work done on the other two matters was done by the claimant, I find that the claimant has not discharged the burden of proof in relation to the other two matters for client U. I make no comment on whether or not VAT should have been charged in relation to requests for money on account as this does not form part of the issues for determination.

For client FE

59. In relation to client FE the claim was for £250 for employment advice on a settlement agreement and whether this was paid. It is not in dispute that the percentage due to the claimant was 50% if he introduced the client and it was

50% of £500. The invoice from the respondent firm to the client was at page 139. The respondent accepted that the fees were paid by the employer in that case. The respondent's position was that this was paid to the claimant and included in the April 2016 post-termination payment of £2,306.75. The claimant said he did not know this because he did not know what the payment of £2,306.75 related to.

60. There did not appear to be a dispute that the claimant was entitled to the sum of £250 as payment of his wages on this matter and to the extent there that might be any dispute, it is my finding that the claimant is entitled to this sum. Credit must be given by the claimant for sums paid to him.

<u>Post termination payments</u>

61. The respondent made two post termination payments to the claimant in April 2016. She did not attribute those payments to work done for any particular client and the claimant has not given credit for those payments as he says it is not up to him to decide how the respondent wished to allocate it.

62. Those post termination payments were made on 6 April 2016 in the sum of £2,306.75 and on 8 April 2016 in the sum of £2,100, making a total of £4,406.75. Whilst it would have been much more helpful if either the respondent had made clear what those payments were for and/or for the claimant to have given credit for them against sums claimed, I find that these payments have been made and that credit must be given for them against the sums claimed.

The relevant law

63. Section 13(1) of the ERA 1996 provides an employer shall not make a deduction from wages of a worker employed by him unless the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or the worker has previously signified in writing his agreement or consent to the making of the deduction.

64. Section 24(2) of the ERA 1996 provides that where a tribunal makes a declaration that the claimant is entitled to payment of any unlawful deduction, it may order the employer to pay to that worker, in addition to any other amount ordered to be paid to the claimant, such amount as the tribunal considers appropriate in all the circumstances to compensate him for any financial loss sustained, which is attributable to the matter complained of. The loss must be as a result of the unlawful deduction.

Conclusions

65. This is a case which depends upon the contractual arrangements between the parties and the statutory provisions in section 13 of the Employment Rights Act

1996. Where I make reference below to the "employer" this is in a loose sense as Employment Judge Spencer decided at an earlier hearing that the claimant was a "worker" and I am aware that he was not an employee. Workers of course have the protections afforded by section 13.

66. I have made findings above that there was no contractual agreement between the parties for any claw back of the claimant's fees. If a worker or employee performs below standard, the employer has options it can take. This is either to performance manage the worker or to terminate the contract subject to the legal requirements that apply to that situation. The remedy is not to make deductions from pay and this is the purpose of section 13 Employment Rights Act, so that employees and workers are not subject to deductions from wages where there is no agreement to the deduction. This protects workers and employees from having their pay reduced when the employer decides that it is not happy with the work done.

67. It was acknowledged by counsel for the claimant that if the respondent thought that the claimant had acted negligently, there were other routes that she could have taken. I make no comment about this. The respondent acknowledges in many of the cases that the claimant did the work but says it was not of any value. The deduction of his pay is and was not an available option in those circumstances.

<u>For client A</u>

68. My finding above is that there was no agreement to increase the claimant's monthly fee for client A to £10,000 per month. His entitlement is to £5,000 per month.

69. I also find that even if the claimant did not do the work to the standard required by the respondent, there is no entitlement on the part of the respondent to "claw back" his pay for the reason set out above. He is entitled to be paid in respect of client A but at a monthly fee of £5,000 and not £10,000.

<u>For client WK</u>

70. The finding above is that there is no dispute on the entitlement to £4,000 and this is the amount to which the claimant is entitled. Credit must be given overall for sums paid by the respondent.

<u>For client M</u>

71. The finding above is that the claimant did the work and the client was billed and paid the respondent. The respondent made a reduction in the amount she paid to the claimant because she had to deal with a client complaint and do work herself. She paid £556.75 against the £906 due. I agree with the respondent's submission that there are no grounds to withhold payment of wages. This is not

the remedy for an employer when on their case a worker does not do the work well. The balance due to the claimant in respect of client M is £349.55.

For client U

72. The finding above is that the claimant is entitled to be paid £800 in respect of work done for client U but there is no entitlement on the other two matters.

For client FE

73. The finding above is that the claimant is entitled to the sum of £250 with credit to be given overall for any sums paid by the respondent to the claimant.

Considering remedy

74. The findings above will assist the parties in calculating the figure that is due to the claimant from the respondent in relation to the matters upon which he has succeeded in this case. He has not succeeded on all matters.

75. From that final figure, the claimant must give credit for the two April 2016 post-termination payments in the total sum of £4,406.75.

76. I took the view that it was not possible to determine remedy without hearing further from the parties. There is a section 24(2) claim which can only be addressed when the tribunal has made a declaration as to the entitlement to payment. Any losses that might be awarded under section 24(2) must be as a result of the unlawful deductions. The closing submission from the claimant at paragraph 37 of the written submissions was for £3,716 on the basis that the claimant succeeded in full which he has not. The respondent did not make any submissions on the section 24(2) claim and neither party made oral submissions upon it.

77. The parties are strongly urged to seek to resolve the final issue of remedy. They will be able to calculate the sum due to the claimant from the findings above and offset the sums paid by the respondent post-termination in April 2016. The claimant will need to show an evidential link between any losses incurred as a result of the failure to pay him what is due.

78. The parties are also urged after 4.5 years of litigation to take a pragmatic approach to this versus the continuing stress of the litigation and the time and cost of yet another hearing. The tribunal envisages a three hour remedy hearing and will make strict orders as to presentation of evidence (particularly documents) in the light of the history of the case. It is hoped that this can be avoided.

79. I expressed my thanks to both counsel for the high standard of their work in a difficult case and their skill in taking the tribunal to the relevant documents where the document preparation was lacking in focus and no heed had been taken by

the parties from the comments made by the previous tribunal at paragraphs 7 and 8 of the Reasons.

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Employment Judge Elliott

7 December 2020

Sent to the parties and entered on the Register on:

07/12/2020

For the Tribunal: