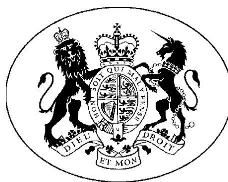

EMPLOYMENT TRIBUNALS
London Central Region

Heard by CVP on 17/9/2021

Claimant: Mr R Bains

Respondents: Sunbird Business Services Ltd
Mr W Sykes
Mr M Aldridge
Mr J McDonough
Mr Matthew Insley

Before: Employment Judge Mr J S Burns

Representation
Claimant: Ms R Canneti (Counsel)
Respondents: Mr Rees Phillips (Counsel)

JUDGMENT

1. The First Respondent shall pay the Claimant the sum of £140127.81 within 14 days of the date this document is sent to the parties.
2. The application by the First Respondent to stay enforcement of this judgment pending determination of its counterclaim in County Court Case No. P2QZ28KX is refused.
3. It is declared that this judgment does not dispose of the whole of the Claimant's wages claim and is an interim judgment; and that his claims for (i) bonus (ii) deferred salary and (iii) interest are already stayed per paragraph 9 of the Order dated 16/4/2021.
4. Any claim for an uplift under section 207A TULCRA 1992 on any of the above sums, including the sum in paragraph 1 above, is also stayed pending County Court Case No. P2QZ28KX or application by any party.

REASONS

1. I was referred to documents in a main and supplementary bundle and read three witness statements from the Claimant and two from Mr Aldridge (the Third Respondent). I heard evidence from the Claimant and then from Mr M Aldridge and then was referred to written skeleton arguments from both sides and received oral submissions. As the hearing had been listed for one day only, I had to impose a restricted timetable on the parties allowing one hour for cross examination and 45 minutes for oral submissions on each side. Both sides agreed that this was reasonable and neither applied for an adjournment.

The scope and purpose of the Hearing on 17/9/21

2. At the outset of the hearing I stated that I would hear evidence and submissions across a range of issues. However, I reserved my decision as to the proper scope of the hearing. I did this for two reasons: firstly I wanted the parties assistance to construe the meaning and effect of EJ Segal QC's Order which I have referred to below; and secondly I wished in any event to wait until I heard evidence and submissions to make an informed decision as to the reasonableness of determining certain issues in any event.

3. The Claimant's wages claim/s falls into various sections, as follows:

(i) an admitted sum of arrear salary which is agreed was due and unpaid in the sum of US$186370 as at 13/12/2019;
The employment contract in clause 7.11 states "*Any US$ denomination amounts to be paid …pursuant to the terms of this agreement shall be converted into British pounds at the spot rate of US$0.645"*. I do not understand what this means and asked and was told by the Claimant during his evidence (unchallenged on this point) that the agreed conversion rate was 1.33 US$ to the pound, so I have applied that rate to give a UK pound equivalent is £140127.81.
While the Respondent admits that this sum would otherwise be due and payable, it avers that no judgment should be entered against it in relation to this sum because of the terms of the Claimant's employment contract and in particular clause 7.10.

(ii) bonus of US$60000 awarded to the Claimant by letter dated 26/1/2019 and shown in his January 2019 payslip, but never paid; The First Respondent's defence to this, in summary, is that the trigger events for the payment of the bonus was not fulfilled - and again it relies on clause 7.10

(iii) deferred salary in the agreed sum of US$70833. The Respondent agrees that this amount was deferred under some arrangement between the parties but there is a dispute over the terms of the deferral and it again relies on clause 7.10.

(iv) simple interest on the outstanding amounts from time to time at the rate of 11% pa to date of payment in full (which according to the Claimant was agreed or is taken to have been agreed by Mr W Sykes in mid 2019 on behalf of the First Respondent as additional to the Claimant's wages and which, according to the Claimant's calculations, amounted to US$75598 as at 6/9/21). The Respondent in summary, denies there was any such interest agreement and it also was submitted in argument today that if there was such an agreement, it was not one for wages within Part II of ERA 1996.

(v) the Claimant claims an uplift on the above sums under section 207A TULCRA 1992.

4. On 16/4/21 this matter came before EJ Segal QC. The Respondents were represented by Mr Rees Phillips and the Claimant was in person.

5. EJ Segal QC ordered that while the claims for Unfair dismissal, discrimination and whistleblowing etc should be stayed pending County Court proceedings between the Claimant and First Respondent, at least part of the Claimant's wages claim should not be. He accordingly ordered in paragraph 1 of his Order that there would be a one-day CVP FMH "*to determine the Claimants clam for unpaid salary wages (salary only) without the tribunal being required to consider whether the First Respondent has any entitlement to (re-)claim money from the Claimant (as pleaded in its Counterclaim in County Court Case No. P2QZ28KX)".*

6. I have concluded that on a proper construction his order meant or at any rate for today's purposes must be taken to mean that only the agreed sum (ie item (i) in paragraph 3 above) should proceed to a final hearing (as it has done before me today) and any other aspects of the wages claim (ie paragraph 3 (ii) to (v) inclusive) are to be stayed or treated as already stayed along with the other claims stayed by EJ Segal QC.

7. EJ Segal QC's Order is not as clear as it might have been, and I am not certain whether he appreciated fully that the salary claim fell into two sections namely (i) and (iii) above or that, in addition to the bonus and interest claims, there was a claim under section 209A TULCRA 1992 to be dealt with.

8. However my construction of his Order is suggested by his use of the words "*Wages (salary only)"* read with paragraphs 3 to 10 of the reasons, and in particular paragraph 3(2) to 3(3) of the reasons, where he drew a distinction between the substantial unpaid wages which it was common ground were outstanding, on the one hand, and the "*other monies" including inter alia bonus and interest"* - ie the fully disputed aspects - on the other. Ie only the admitted sum in paragraph 3(i) above was to be dealt with today, and everything else stayed.

9. Mr Phillips who was at the hearing before EJ Segal QC, told me that this is what he understood the effect of the Order to be, and that the First Respondent had prepared for today's hearing accordingly.

10. There is also the point that while a one-day listing for a CVP hearing is suitable for determining the paragraph 3 (i) issues, (where the sum is admitted and the remaining issues are a matter of construction and discretion and require little if any evidence), the same cannot be said of parts (ii) to (v) where the facts are in dispute and full evidence will be required.

11. EJ Segal QC in paragraphs 8 -9 of his Reasons provided the following further explanation about the purpose and assumption to be applied of today's hearing as follows:

"8. Without in any way seeking to determine the following matters, it seems to me that it is arguable that:-

1) The failure of R to pay C's arrears of wages is not covered by the exception in s.13(1)(a) ERA 1996 that "An employer shall not make a deduction from wages of a worker employed by him unless... the deduction is... authorised to be made by virtue of... a relevant provision of the worker's contract" - irrespective of whether the Counterclaim has any merit. That will depend, probably, on whether the entitlement of R set out in clause 7.10 "to cease making further payments under clause 7.1" can be construed to include a situation where (as here) R has already allowed salary arrears to accrue.

2) If R was not entitled to withhold C's arrears of salary pursuant to s.1 3(1)(a), then it is arguable that R should not be entitled to resist enforcement of an award made to C in that regard pursuant to ss. 23(1)(a) and 24(1)(a), (2), by reason of the Counterclaim.

3) Even if R were entitled in principle to resist enforcement based on the Counterclaim, it may be that a court would order partial payment or any salary arrears ordered by the tribunal, in all the circumstances.

9. That being so - and C acknowledging the risk, in particular, of not being able to enforce such an award with the potential consequential costs involved - and given that this matter can be determined by the tribunal at a one-day remote hearing, I hold that the overriding objective is best served by listing that single issue for determination at the earliest convenient opportunity. For the avoidance of doubt, the issue to be determined is limited to whether, assuming for this purpose that the Counterclaim as pleaded has merit, C is entitled to an award under s. 24 ERA."

<u>Findings and conclusion about the claim referred to in paragraph 3(i) above.</u>

12. Clause 7.10 of the employment contract reads: "*If … the Employee is found to have breached any of the terms of this Agreement or the Employee's duties to the Company during the Employment, such that the Company would have been entitled to terminate the Employment without notice …, the Company shall be entitled to recover any payments made under clause 7.1 [salary entitlement] and/or clause 7.8 [bonus] and/or to cease making further payments under clause 7.1 with immediate effect. Any such payments already made shall be recoverable from the Employee as a debt".*

13. I am required to and do assume for present purposes only that the First Respondent's County Court Counterclaim (which claims that the Claimant did fundamental breach his contract and duties) has merit - ie that he did breach them.

14. Ms Canneti submitted that clause 7.10 of the employment contract was invalid and unreasonable and if applied would have the effect of divesting an employee of all his income. In her skeleton argument she wrote:

    …., the interpretation offered by R of clause 7.10 is not in fact reflected in the Service Agreement. The clause is vague, incomprehensible, unreasonable and unenforceable;

    …. any enforcement of R's purported interpretation would be misconceived and unthinkable for policy reasons, on account of the acute disadvantage to which such a clause would put any employee: the temptation would inevitably arise for employers to summarily dismiss employees for confected purported misconduct in order to boost their coffers (by way of a refund of their wages) or to evade their duty under s13 ERA;

    d) The intention of clause 7.10 of the service agreement was more feasibly to enable R to recover notice or PILON in circumstances in which it subsequently transpires that it would have been entitled to dismiss without notice and cannot in any event properly be constructed so as to allow R to recover monies paid or owing by way of wages, including a bonus entitlement that crystallised prior to the EDT:

15. Mr Phillips agreed both that if clause 7.10 allowed an employer to divest retrospectively an employee of all income, that would be unreasonable. While he submitted that the clause was nevertheless valid and enforceable in some way, he did not put forward any suggestions as to how parts of the clause could be severed or some less draconian interpretation applied to rescue the clause.

16. It is trite law that a penalty clause is a contractual provision which levies an excessive monetary sum unrelated to the actual harm against a defaulting party and that penalty clauses are generally unenforceable under English law.

17. In Cavendish Square Holding BV v Talal El Makdessi [2015] UKSC 67 the judges held that the *"true test is whether the impugned provision is a secondary obligation which imposes a detriment on the contract-breaker out of all proportion to any legitimate interest of the innocent party in the enforcement of the primary obligation. The innocent party can have no proper interest in simply punishing the defaulter. His interest is in performance or in some appropriate alternative to performance." They described the penalty clause rule as "an ancient, haphazardly constructed edifice which has not weathered well", but decisively stated that the rule should not be abolished. This is because the rule is a "long-standing principle of English law", which has a "useful role to play in protecting people against some categories of oppressive bargain[s]"; particularly where the parties are of "unequal … bargaining power" and there is a "risk of oppression".*

18. The National Minimum Wage Act 1998 section 1 requires any person working or ordinarily working in the United Kingdom under his contract to be paid the national minimum wage and section 49 provides that any provision to the contrary is to that extent void.

19. While the Claimant worked for the First Respondent sometime at least in Africa, his employment contract in clause 5.1 stated that his place of employment was the UK.

20. Although I was not referred in terms to the law about penalty clauses and the NMWA 1998, as recorded above I received submissions from both sides about the validity and enforceability of clause 7.10, which in substance covered the same ground.

21. I find that the whole of clause 7.10 of the employment contract is an obviously unenforceable and invalid penalty clause. If it was given effect then, on the employee committing any fundamental breach of contract, or director's duties, and whether or not this caused the employer any loss, the whole of the employee's salary and previous bonuses, which could have been earned over many years of good service, would be repayable to the Employer, thus having the effect that the employee had worked throughout for no remuneration.

22. If I am wrong in finding that the clause is invalid as a whole then in any event I would find that under the *contra proferentem* rule the latent ambiguities in the clause 7.10 are to be construed against the First Respondent.

23. It is ambiguous as to what is meant by "*found to have breached any terms of this Agreement….*" in that it does not state who or what is entitled to make such a finding. If it was intended that the First Respondent employer was to be entitled to make a contested unilateral finding in its own interest that such a breach has occurred, thus divesting the employee of the whole of his rights to retain or receive all remuneration, then this should have been stated plainly. If the clause is valid, I find that the words must mean that the finding must be made by a properly constituted UK court or tribunal, (the law of the contract being English and the parties having agreed to submit to the non-exclusive jurisdiction of the English courts with regard to any dispute - see clauses 19.1 and 19.2). No such finding has taken place so section 7.1 cannot be relied on.

24. It is ambiguous also as to what is meant by "*cease making further payments under Clause 7.1 with immediate effect*". EJ Segal QC has already touched upon this in paragraph 8.1 of his reasons cited above.

25. Clause 7.1 reads: "*During the employment the company shall pay to the employee a fixed salary at the rate of US$100000 per year".* Clause 7.2 provides *"the salary shall accrue from day to day and be payable by equal monthly instalments in arrears on the 28th day of each month".*

26. The sum of agreed arrears in paragraph 3(i) above the subject of my judgment is not money which if paid would be paid as normal annual salary payable monthly in arrears under clause 7.1. Instead it is an accumulation of salary which fell into arrears over many months namely in April 2016 and then over the months October 2018 to December 2019 inclusive.

27. If clause 7.10 is valid, then I would interpret it as meaning that on a finding of fundamental breach by the employee, the employer would then be entitled to withhold further monthly salary which fell due after the finding, but not accumulated arrears which should have been paid but in breach of contract had not been paid at the proper time. Under this interpretation again the First Respondent cannot rely on the clause because the sums had accumulated as overdue before any finding.

28. Therefore, even if the Claimant has been guilty of fundamental breach, (which at this stage I am required to assume because of paragraph 9 of EJ Segal QC's reasons cited above) the First Respondent is not entitled to rely on clause 7.10 as a valid exception justifying a deduction in s.13(1)(a) ERA 1996, and the Claimant is entitled to judgment under section 24 ERA 1996 because of the First Respondent's failure to pay his arrear wages.

29. Mr Rees Phillips submitted in his skeleton argument "*R1's defence is also a straightforward defence of set-off. If R1 had a contractual claim in the ET then, as would be standard, the Tribunal would determine C's claim and R1's employer claim, and any positive findings in R1's favour would set-off any award to C, including the amount R1 already admits is owed to C save for the set-off defence. Likewise, if C had brought his claim for wages in the County Court as a breach of contract claim and R1 made its current counterclaim in response, the County Court would treat the matter exactly the same – it would determine C's claim and R1's counterclaim and set-off any award to C (including an amount otherwise admitted save for the set-off defence) by any amount awarded to R1. It is wholly unclear why or how C might suggest that because C's claim is in the Tribunal and R1's counterclaim is in the County Court, the outcome ought to be different. ….Per* <u>*Ridge v HM Land Registry*</u> *[2014] UKEAT/0098/10 the defence of set-off is available in the Tribunal, in that case in relation to a claim by the claimant that the respondent had breached his contract by failing to pay pension contributions, the respondent counterclaimed but did so out of time, and so thereby relied on the counterclaim against the claimant solely as a defence of set-off. The EAT confirmed set-off was available in the Tribunal as an equitable principle, and stated: "it has long been the law that a debt may be raised by way of set-off if it is sufficiently closely connected with the claim so that it would be unjust to require the defendant to pay the claim without deduction".*

30. However, at present there can be no set-off because the First Respondent has no judgment against the Claimant to set-off.

31. In this scenario the First Respondent applied for a stay on the judgment pending the determination of the counterclaim, so that if the counterclaim succeeded it could be raised at that stage as a set-off in partial or complete extinction of the judgment.

32. Mr Rees Phillips written submission about this was as follows: "*It is plainly inequitable for R1 to have to pay C unless and until its claim against him in the County Court is determined. C's position before EJ Segal QC was that he was effectively destitute and, but for the kindness of unnamed family members, that he would be street homeless. Whether this is right or wrong is unknown, nor is it known why C has not sought new employment since being dismissed by R1 in December 2019, but it remains his stated position. R1 has no security against C, nor any means of achieving any. There is no prospect, therefore, that any sum paid to C by R1 now would ever be available to be enforced against when R1's counterclaim is proved and it is awarded substantial damages against C. R1 anticipates that C will not have the means to satisfy any judgment award against him on R1's counterclaim, save for the set-off against the salary payments R1 admits are otherwise owed.*"

33. Section 24(1)(a) of the ERA states "*Where a tribunal finds a complaint under section 24 well-founded, it shall make a declaration to that effect and shall order the employer, in the case of a complaint under section 24(1)(b), to pay the worker the amount of any deduction made in contravention of section 13*".

34. Rule 66 in Schedule 1 of the ETs (Constitution and Rules of Procedure) rules 2013 makes it clear that a tribunal judgment or order can give a variety of dates for compliance and also that judgments can be stayed. I see no reason why this power would not apply to a section 24 judgment.

35. EJ Segal QC stated that the assumption that "*the Counterclaim as pleaded has merit*" should apply when I determined the question whether any section 24 judgment should be entered, He did not state that it should apply to the question whether any judgment under section 24 should be stayed. If, despite not stating that, it was nevertheless his intention, then clearly in his view this would not in any event preclude the reasonable possibility of my ordering "*partial payment or any salary arrears ordered by the tribunal, in all the circumstances.*"

36. I approach the question whether I should stay the judgment on the basis that I have a discretionary power to do so, to be exercised in accordance with the overriding objective and the substantive justice and fairness of the case.

37. I have decided that despite the points made by Mr Rees Phillips, and even on the assumption that the Counterclaim as pleaded has merit, I should not stay the judgment for the following reasons:

38. There is no doubt and it is not in dispute that the judgment represents substantial arrears which should have been paid when they were earned, and which in part date back to 2016. It is inequitable that the Claimant be kept out of his earnings any further.

39. To allow the Respondent now to defer payment of the judgment would allow it to capitalise on and benefit from its long-standing breach of contract by in effect giving it security for its counterclaim which it would not otherwise have had, if it had conducted the employment contract properly in the first place.

40. The scheme of Part II of the ERA 1996 reflects a policy that a worker should be paid his wages promptly and without deduction save for limited exceptions, which I have held do not apply here. To allow the First Respondent a stay so it can make a wholesale deduction from the Claimant's wages unauthorised by him by setting-off a future counterclaim award, would fly in the face of this policy.

41. To allow a stay would in effect give the First Respondent powers akin or similar to those it has sought to enact in clause 7.10 of the employment contract, which I have already found is an invalid and unenforceable provision in an employment context.

42. The Claimant claims that he is impoverished by the prolonged failure by the First Respondent to pay him, which failure is not disputed. Despite the fact that the Claimant was presented by Ms Canneti (apparently on a direct professional access basis) at today's hearing, she referred to him as still acting in this matter as a "*litigant in person*".

43. The mode by which the Claimant presented the documentation showed that he has been reliant on himself rather than any professional lawyer to do most of the preparation for today's hearing.

44. The fact that he was not paid by the First Respondent for many months and years will naturally tend to make it more difficult for the Claimant to pay for professional legal representation to assist him in the County Court, High Court or Tribunal. The First Respondent on the other hand is a substantial company which is fully and professionally represented. Allowing a stay of the judgment would tend to continue the disparity of arms created or at least aggravated by the First Respondent's significant and historic breaches of contract in failing to pay the Claimant.

45. The judgment sum represents less than half the sums which the Claimant claims as wages and the remainder of his claims have been stayed.

46. The First Respondent's County Court counterclaim was stayed pending a winding-up petition which was issued against The First Respondent in May 2020 and which was dismissed on 22/1/21 following the grant of a Scheme or Arrangement on 15/12/20. The County Court claims were stayed pending determination of the winding up petition. The stay on the Counterclaim therefore expired on 22/1/21. Despite obtaining a stay of most of the Claimant's ET claims in April 2021, there is no evidence that the First Respondent has taken any steps to revive or prosecute its Counterclaim since 22/1/21 which is now 8 months ago. Mr Rees Phillips told me

that despite the fact that the Claimant has not filed his Reply and Defence to Counterclaim in the County Court, there has been no application by the First Respondent for default judgment. Instead the First Respondent has been "*waiting to see what happened today*". The First Respondent for whatever reason appears to be content to adopt a leisurely approach to pursuing its counterclaim.

47. Mr Rees Phillips submitted that '*the obvious outcome of any judgment award, …will be that R1 will resist any winding up petition C might threaten by pointing out that it has a substantial crossclaim which would extinguish the judgment sum. As such, this exercise is plainly without much practical benefit to C in any event.*"

48. It will be of course a matter for the High Court to decide whether any winding up petition which the Claimant may present on the basis of my judgment should be dismissed because of the pending County Court counterclaim. In that event the High Court will no doubt wish to consider very carefully whether the cross-claim is bona fide, (a matter which I have been required to assume but which assumption will not bind the High Court) and also whether it is right in any event to delay or dismiss a petition presented to compel payment of long-withheld unpaid wages.

49. In any event I do not think it right that I should grant a stay because the Claimant may face further enforcement difficulties down the road which are not within my power to deal with.

J S Burns Employment Judge
London Central
17/9/2021
For Secretary of the Tribunals
Date sent to parties : 20/09/2021