Case Number: 3312444/2020 (CVP)

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr M Gerber	**v**	Honeypot Group LTD Barnet Football Club Academy Limited

Heard at: Watford **On:** 23 & 24 September 2021

Before: Employment Judge S Moore

Appearances
For the Claimant: In person
For the Respondent: Ms N Kleanthous

This has been a remote hearing on the papers to which the parties did not object. The form of remote hearing was CVP. A face-to-face hearing was not held because it was not practicable and all matters could be determined in a remote hearing.

JUDGMENT

(1) Barnet Football Club Academy Limited is joined as a Second Respondent.
(2) The claim for a redundancy payment is dismissed on withdrawal by the Claimant.
(3) The claim for holiday pay is dismissed.
(4) The claim for unpaid notice pay succeeds in the sum of £3,644.94 net.
(5) The claim for unlawful deduction of wages succeeds in the sum of £226.31 net.
(6) The claim for unfair dismissal succeeds, but the Claimant is not entitled to any compensation as he is not entitled to a basic award (having received a redundancy payment) and he is not entitled to a compensatory award as he did not suffer any loss beyond that already compensated for in his claim for notice pay.
(7) The total amount owed by the Respondent to the Claimant is £3,871.25.

REASONS

1. This is a claim for unfair dismissal, a redundancy payment, notice pay, unlawful deduction of wages and holiday pay. I heard evidence from Mr Gerber and, for the Respondent, from Ms Natasha Kleanthous and I was also referred to a bundle of documents. On the basis of that evidence, I make the following findings of fact.

The Facts

2. The Second Respondent was an elite football club academy with over one hundred youth footballers enrolled for the purposes of providing advanced coaching, education and player development to assist them in becoming professional footballers. It operated within a Premier League /EFL licence programme called the Elite Player Performance Plan (EPPP), EPPP being a third-party regulator which provides licences to youth academies in accordance with fixed criteria. An EPPP licensed academy is eligible to be included in certain football leagues, tournaments and funding. Without such a licence, the academy is expelled from the EPPP, loses its funding, and is unable to compete in the associated leagues and tournaments.

3. One of the licence criterion is that the senior team to which the academy is linked must be participating in the Premier League or the EFL. If the senior team drops out of these leagues, the academy has only two years remaining within the EPPP scheme before its licence is withdrawn and it is expelled from the EPPP (unless the senior team regains a place in the EFL, in which case the academy retains its EPPP licence, funding and operations).

4. At the end of the 2017/18 season Barnet FC was relegated from the EFL. The EPPP notified the Second Respondent that its funding would be reduced by 50% the following year (2018/19) season, before being withdrawn completely and its licence being terminated at the close of the 2019/20 season.

5. The Claimant was employed by the Second Respondent from 23 November 2017 as an Academy Administrator. His duties involved liaising with the coaching and managerial staff, providing a link between the Club management and the academy staff and players, assisting with logistical matters, advising on relevant regulations, liaising with the relevant regulatory bodies and carrying out registration, transfer and other staff or player paperwork. The First Respondent is apparently an old company which is now only active and registered as a payroll company, and for the remainder of this judgment, “Respondent” will mean “the Second Respondent”.

6. After Barnet FC was relegated from the EFL in 2018, the Claimant was aware of the implications for the Academy and the possibility that his role would be redundant. That possibility increased at the end of the 2019 season when

Barnet FC failed to get promoted into the EFL at which point the club had one last chance to gain promotion at the end of the 19/20 season, failing which the Respondent would lose its licence and stop operating.

7. In early March 2020 the 19/20 season was suspended because of the Covid-19 Pandemic and, based on the information available at the time from the EPPP and the EFL, Barnet FC was deemed to have failed to achieve promotion which meant the EPPP licence would be withdrawn.

8. Those at risk of redundancy, including the Claimant, met with senior management to be informed of the position, and after that meeting, on 17 March 2020, Sharon Wilde (SW), HR Manager, wrote to the Claimant as follows:

   "As you are aware at the end of the season our EPPP Licence will terminate and all youth funding will cease. We are therefore unable to continue to run the existing youth programme we have in place.

   We are extremely sorry to inform you that we hereby give you notice of the termination of your contract on 29 April 2020.

   We do hope to run an alternative college programme next season, and we will furnish you with details of the opportunities that may arise within this reduced programme.

   …"

9. The 29 April 2020 was identified as the Claimant's termination date because it was the last day of the 2019/20 season, however, under his contract the Claimant was entitled to three months' notice.

10. On 18 March 2020, he emailed SW, stating "In regards to the letter of notice given to me yesterday, I am informing you as stated in my contract that my notice period is three months".

11. The Claimant did not receive any response to that email. By this time, the situation across the UK and the rest of the world was one of turmoil due to the Pandemic.

12. On 21 March 2020, SW wrote to all employees, including the Claimant:

    "We are currently waiting for further updates from the government on the support that they will give to businesses whilst we are all in this current period of uncertainty.

    Due to the sudden reduction in work this week, we have had to take steps to inform some employees that we need to give them notice of change to their employment.
    Currently **all employees** will be classed as "furloughed workers", although this will affect staff in different ways.

Once we receive more information we will immediately advise how the support available will directly affect you.
As you may be aware, the suggestions are that they will be providing 80% of employees salary for a period of up to 3 months, however we have not received full details yet.
…"

13. On 23 March 2020 the UK Government ordered a national lockdown, to come into force on 26 March 2020.

14. On 26 March 2020, SW wrote to all staff, including the Claimant, in the following terms:

"Further to our email to all staff on 21 March 202, we are writing to formally notify you that your position is being postponed as a result of the current circumstances with the current Covid-19 virus. In accordance with the guidelines the company is required to give you notice, that from 1 March 2020, your current employment status will be amended to a "furloughed worker".
…
At the time of writing the length of the furlough period is unknown. We are currently waiting for the "Coronavirus Job Retention Scheme" to be introduced by the Government, which they are advising should be April 2020. We will keep you updated via email. …

We thank you for all the contributions you have made to our company and hope to see you back at work soon."

15. The letter required employees to sign a form confirming they had received the letter and agreed to a change in their status to "furloughed worker".

16. On 5 April 2020, Tony Kleanthous, the owner of Barnet FC, sent the Academy staff and coaches, an email stating:

"I have held off writing to you sooner in the hope of having some positive news with regards to your contracts and pay.

I know many of you have been anxious but discussion between the Leagues, the FA and the Clubs has been on going and changing daily so I wanted to be absolutely clear on the current position before communicating any news to you all.
…
Government advice is that all staff should be furloughed if possible and this can be backdated until March 1st but to this day it's still unclear how this affects those on fixed contracts, like many of the Academy staff and Players.
With the payroll looming and information changing by the minute, we decided to wait for the last moment before making an offer to furlough you all in the hope that football may provide a better solution.

In the absence of any alternative we took the decision yesterday to offer furlough and you would have received an email confirming this from our HR department.
…
We also have not had any positive feedback yet regarding our application for an Academy licence to the FA PGB or financial support from the FA WSL.
I think it's time for us all to accept our fate and make plans to live within the means available to us…We will therefore continue with the plan to furlough all staff and hope you will all understand that this is out of necessity in order to support as many people as possible in these troubling times.
…"

17. The Claimant said in evidence that he believed these letters had the effect of withdrawing his notice of dismissal (on grounds of redundancy). He understood the references to his change in status to furloughed worker from 1 March 2020, his position being postponed, the offer to furlough to all staff, and the sentiment, we hope to see you back at work soon, all indicated that his notice of dismissal had been withdrawn and he had instead become a furloughed worker for an indefinite period of time.

18. The date of 29 April 2020 came and went (being the date of termination SW had given the Claimant in her letter of 17 March 2020) and the Claimant's employment continued; that is to say, he continued to be paid 80% of his wages pursuant to the CJRS.

19. On 12 May 2020 the Claimant sent an email to SW stating that he was not happy about the fact he had been getting a number of messages from more senior members of staff whilst on furlough and on one occasion being asked to come in. The email further stated that he had been under lot of stress "since it was announced we were being served our notices and then being put on furlough with the likelihood there will be no academy to come back to when this settles down".

20. The Claimant received no response to that email.

21. The date of 17 June 2020 came and went (being the date the Claimant's contract would have terminated had he been given his contractual notice) and still the Claimant's employment continued, and he continued to be paid 80% of his wages pursuant to the CJRS.

22. The Claimant said, and I accept, that he did not query the situation, because, since he believed his redundancy notice had been withdrawn, he was not surprised that his employment continued.

23. On 4 August 2020 the Claimant received his payslip for July 2020 (payment due to be made 12 August 2020). On 5 August 2020 he emailed SW and Nathan Day (ND), also in HR, raising a query about his holiday pay and asking why his gross pay for July was less than all the previous months on furlough.

24. On 5 August 2020 the Claimant was sent the following letter:

> "As you are aware following our previous email sent on 17 March 2020 at the end of the season the EPPP licence terminated and thus all youth funding has ceased. Due to this we were extremely sorry to give you notice of termination, with 29 April 2020 being your last working day. It was at the company's discretion to remain you on furlough as long as possible. However it has been brought to our attention that the furlough guidelines have now changed, and therefore, we can no longer support you under this scheme.
> We are hereby informing you that your last date of employment will be 25 July 2020, with your last payment date being 12 August 2020."

25. In evidence the Claimant stated that this letter came as a total shock and that had he appreciated he was about to be dismissed he would have known to start searching for other jobs.

26. Notably the purported date of termination of 25 July 2020 pre-dated the date of the letter of 5 August 2020. Ms Kleanthous stated that the Claimant's employment had been extended to 25 July 2020 because that was the date on which Barnet FC lost the National League play-offs, which removed their last chance of securing a place in the EFL and retaining their EPPP licence. However, it was not suggested that the Claimant had been informed that his employment was being extended to 25 July 2020 for that reason or at all. Indeed, he stated that he only became aware that Barnet were playing the National League play-offs when he heard about it on the news.

Conclusions

(1) Redundancy payment

27. The claim for a redundancy payment is dismissed on withdrawal by the Claimant, it having been agreed that the Claimant was paid a redundancy payment of £692.30 in October 2020.

(2) Holiday pay

28. The Claimant maintains he has not been paid the holiday pay to which he was entitled. Under the Claimant's contract of employment his annual leave year runs from 1 July to 30 June, with no contractual entitlement to carry that leave forward into the following year. As at 30 June 2020 the Claimant was owed 17 days annual leave. The Respondent dealt with this situation by increasing the Claimant's pay to 100 per cent in respect of 17 days in the July payroll, those 17 days therefore effectively being treated as days of annual leave (for which the Claimant was entitled to be paid at 100 per cent, rather than the furlough rate of 80 per cent). The Claimant appears to consider that he was entitled to 17 day's pay on top of his furlough pay, however I am satisfied that he was paid the correct holiday pay consistent with his contractual provisions and the relevant rules of the CJRS.

29. The claim for holiday pay is therefore dismissed.

(3) The claim for Notice Pay

30. On 17 March 2020 the Claimant was given notice that his employment contract would terminate on 29 April 2020. The question is whether that notice was withdrawn by implication, or whether it was varied by implication, with the notice period being varied to 25 July 2020.

31. The Claimant said in evidence that he believed the communications from SW of 21 and 26 March 2020 had the effect of withdrawing his notice of dismissal and that he had instead become a furloughed worker from 1 March 2020 for an indefinite period.

32. I accept that evidence. However, the test of contractual intention is objective, rather than subjective, that is what an objective bystander in the position of the Claimant would reasonably have understood the position to be, rather than what the Claimant himself believed the position to be, and that is what I consider now.

33. In this respect, as a starting point, as a matter of principle, there was nothing inconsistent with the Claimant being both a furloughed worker and being on notice of redundancy, since at the relevant time the Coronavirus Jobs Retention Scheme (CJRS) allowed for notice to be served whilst on furlough.

34. However, the Claimant continued to be employed (and paid) after, first, 29 April 2020 (the date on which his notice of redundancy had been stated to take effect) and, secondly, 17 June 2020 (the date on which his 3-month notice period – had he been given the correct notice in the letter of 17 March 2020 – would have taken effect).

35. It follows that after 17 June 2020 a reasonable person in the Claimant's position could only have understood his continued employment as being referable to a mistake on the part of the Respondent, a purported extension of the notice period, or a withdrawal of the notice of dismissal.

36. There was no suggestion that mistake was relevant here, so the question is whether a reasonable person in the Claimant's position would have understood that the Respondent was intending to extend his notice period or rather that the notice of dismissal had been withdrawn altogether.

37. While there may have been a logic to extending the Claimant's employment to 25 July 2020, there no communication whatsoever from the Respondent to the Claimant to suggest that his notice period was being extended, let alone why, or that it had been extended to 25 July 2020. Furthermore, I don't consider it can be said that the 25 July 2020 was such an obvious date to which to extend the Claimant's employment that he should reasonably have understood that this was what the Respondent was proposing to do, and impliedly agreed to it, even in the absence of any communication. Indeed, even in the letter of 5 August 2020 ND didn't suggest this was the case, and

in fact stated that the reason why the Claimant's employment had been terminated was because the furlough guidelines had been changed and the Respondent could no longer support the Claimant under that scheme.

38. This brings me to the wider context of the communications sent to the Claimant on 21 and 26 March and 5 April 2020. Whilst, as stated above, there is nothing of itself inconsistent with an employee being both on furlough and on notice of redundancy, those communications make no reference to any redundancy process, or to the imminent termination of those under notice of redundancy, and instead imply that all employees are being furloughed indefinitely with the aim of saving jobs. I therefore consider that a reasonable person in the position of the Claimant, who continued to be employed (and paid) after 17 June 2020, who had not been informed the Respondent was intending to extend his notice period, and who was in receipt of these communications regarding the furlough arrangements, would take the same view as the Claimant did, that his notice of dismissal of 17 March 2020 had been withdrawn.

39. I therefore find that by its conduct the Respondent impliedly withdrew the Claimant's notice of dismissal of 17 March 2020. Accordingly, it follows that the Respondent's letter of 5 August 2020 had the effect of wrongfully dismissing the Claimant without notice and his claim for 3 months' notice pay therefore succeeds.

40. The Claimant's normal rate of pay per month after tax was £1,214.98, making makes a total of £3,644.94 net pay in lieu of notice.

(4) Unlawful Deduction of Wages

41. It also follows that the Claimant is entitled to a shortfall of pay, between the date of his dismissal on 5 August 2020 and the last date for which he was paid (25 July 2020). He has calculated this to be £226.31 net and the Respondent does not take issue with that figure.

(5) Unfair dismissal

42. The reason for the Claimant's dismissal on 5 August 2020 was redundancy which is a fair reason. However, there was plainly no consultation with the Claimant about his dismissal. Although, as from 25 July 2020 when Barnet FC lost the play-offs, it was clear the EPPP funding had been lost, in the following week the Respondent nonetheless sent the parents of the players in its Academy the following communications: "As you know, we are looking to run our own Academy away from the EPPP system, which shall continue to offer a high standard of development and support to young players" and in another, "Last Saturday… does not signal the end of the existing EPP Academy at The Hive London. We are currently finalising details for an exciting new Academy Development Programme for our Academy age groups, details of which will follow shortly." These assurances also correlate with the reference in SW's letter of 17 March 2020 to the possibility of an alternative Academy programme running the following season.

43. I am therefore not satisfied that as at 5 August 2020 it was reasonable for the Respondent to dispense with consultation with the Claimant, because at that time it appears there may have been reasonable alternative employment available for the Claimant within a replacement Academy structure. Accordingly, since there was no consultation, it therefore follows that the Claimant was unfairly dismissed.

44. However, since the Claimant has been paid a redundancy payment he is not entitled to an additional basic award.

45. Furthermore, as regards a potential compensatory award, the evidence is that in the event the Respondent was not able to secure sufficient funding to establish a replacement Academy programme, and that the only similar programme that now exists is run by a third party. It follows that even if there had been proper consultation, I am not satisfied that the Claimant would have remained employed by the Respondent beyond his 3-month notice period, and I am therefore not satisfied that he has suffered any loss attributable to his unfair dismissal additional to the compensation he will receive in respect of his notice pay.

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Employment Judge S Moore

Date: 24 September 2021

Sent to the parties on: .....

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For the Tribunal Office