



EMPLOYMENT TRIBUNALS

Claimant: Katherine Connolly

Respondent: 1. Intisar Salem Ali Alsabah
2. Prismologie International Ltd

HELD AT: London South – Croydon by CVP **On: 21st April 2022**

BEFORE: Employment Judge R J Atkins

REPRESENTATION:

Claimant: In person

Respondent: Abdul Muneeb; group finance manager of Darlulua group

RESERVED JUDGMENT

The judgment of the Tribunal is that:

1. The claimant was an employee of the second respondent.
2. The claim against the first respondent is dismissed as the claimant was neither an employee nor a worker of the first respondent.
3. The second Respondent was in breach of contract by dismissing the Claimant without the full period of notice to which he was entitled, and the second Respondent is ordered to pay the Claimant damages of £25,000.
4. The second Respondent made unauthorised deductions from wages by failing to pay the Claimant in lieu of accrued but untaken holiday and is ordered to pay to the Claimant the sum of £30,421, being the gross sum unlawfully deducted.
5. The second Respondent made unauthorised deductions from wages by failing to pay the claimant the full amount of wages due from 1 February 2021 until 7th November 2021 and is ordered to pay to the Claimant the sum of £103,840 being the total gross sum unlawfully deducted.

REASONS

Participation of the Respondents

6. Mr Muneeb explained that he was the group finance manager of the Dar Lulua group, of which the second respondent formed part and in which the first respondent had an interest. He confirmed that he was authorised to represent both the first and second respondent.
7. The First Respondent submitted an ET3 on 7 November 2021. It was unclear whether this was also intended to cover the Second Respondent. In any event it is substantially out of time and was rejected by the Employment Judge.
8. I therefore advised Mr Muneeb that I was exercising my discretion under rule 21 of the Employment Tribunal Rules of Procedure. As both respondents had either failed to provide a response or had their response rejected, neither respondent would be allowed to give evidence in these proceedings. However, the respondents would be permitted to make closing submissions once all the evidence had been heard from the claimant.

Procedure, documents and evidence heard

9. The claimant informed me that she had lodged a bundle of documents with the employment tribunal on 18th April 2022 addressing the issues identified by the employment judge at the rule 21 referral.
10. As that bundle of documents was not on file, I adjourned the hearing to locate the bundle and arranged for a copy of the bundle to be emailed to the Mr Muneeb. I explained to the parties that I would further adjourn the hearing for 20 minutes to read the bundle of documents.
11. Mr Muneeb advised me that as it was Ramadan, he would need a break from the proceedings to break his fast. There was some discussion as to the time difference between Kuwait, where Mr Muneeb was residing and the UK. It was agreed that the hearing would resume at 3:45 PM UK time and that Mr Muneeb would inform me as and when he needed to take a break to break his Ramadan fast.
12. The tribunal resumed at 3:45 pm as agreed. Mr Muneeb did not return to the proceedings at 3.45 pm or any time thereafter.
13. I heard oral evidence from the claimant.
14. I asked the claimant how payments had been treated in her tax return. She did not know and said she would check with her accountant and let me know after the hearing. I received a further written submission from the claimant on 26th April 2022. The submission re-visited evidence set out in previous submissions by the claimant but did not specifically address the question I had raised with her.

Claims and Issues

15. The Claimant claimed breach of contract in respect of failure to pay her full notice of termination, and unauthorised deductions from wages in relation to both arrears of pay and accrued but untaken holiday pay on termination of employment.
16. The issues as follows:
 - 16.1. Was the Claimant employed by either the first respondent or the second respondent?
 - 16.2. Was the Claimant dismissed by either the first respondent or the second respondent?
 - 16.3. What was the Claimant's notice period?
 - 16.4. Was the Claimant paid by the first or second respondent for that notice period?
 - 16.5. how much holiday entitlement had the claimant accrued but not taken if any by the end of her employment?
 - 16.6. did the first respondent or the second respondent make an authorised deduction from wages by withholding payment of wages from 1st February 2020 until the date of dismissal?

Fact findings

Employee or worker status

17. The second respondent company operated a cosmetics and body products business. The first respondent is a shareholder and director of the second respondent company. The claimant is pursuing a claim for unpaid wages, notice pay and holiday pay against the first and second respondent.
18. The claimant claims that she was employed by both the first and the second respondent.
19. The response rejected by the tribunal stated that the claimant had worked in the capacity as consultant.
20. Although I did not accept this as evidence on behalf of the respondents, I asked questions of the claimant to satisfy myself as to the claimant's status to bring her claim and against who any claim should be brought.
21. The first respondent, acting on behalf of the second respondent, wrote to the claimant on offering her employment with the second respondent and attaching a document setting out the key terms and conditions of that employment. The letter said that a service contract with full terms and conditions would follow in due course. No service agreement was ever issued. The offer of employment was accepted by the claimant on 12th December 2018, prior to its expiry date of 15th December 2018.

22. The claimant started working pursuant to the offer of employment for on the 1st of February 2019.
23. The claimant argues that as the second respondent company had only filed dormant accounts up until the 30th of April 2019, she could not have been employed by the second respondent prior to that date. In evidence, she confirmed that the second respondent company had been trading prior to that date. I find that it would have been possible to be employed by the second respondent prior to 30th April 2019.
24. The Key terms letter confirmed that the claimant would be paid an annual salary of £150,000. From 1 April 2020, the claimant's annual salary was reduced to £135,000 due to the economic difficulties arising from the covid pandemic.
25. Payments were made to the claimant in respect of the services she had provided from a combination of sources. Some payments were paid by the first respondent, some payments were made by the second respondent and other payments were made by group companies located in Kuwait and Jersey. The claimant explained that the financial situation within the group of companies was muddled up and constantly changing.
26. Payments made to the claimant were paid without deduction of PAYE or National Insurance. In Annexure B to the bundle, there was an email from Mr Muneeb dated 6th June 2021, in which Mr Muneeb made reference to the need to get the second respondent indemnified against any other claims from the HMRC for not registering the claimant on the PAYE and NEST or pension schemes.
27. In evidence, the claimant explained that her role was chief executive officer of the second respondent. The first respondent was the founder and director of the second respondent. The claimant would liaise with the first respondent daily. The claimant would enter sales and purchases contracts on behalf of the second respondent company. At no time did she enter any contracts on the behalf of the first respondent personally. All actions she did in the course of her work, she did in the name of the second respondent.
28. After the claimant began working for the second respondent, the first respondent proposed that the claimant be issued shares in the second respondent company and that payment be made to her by way of dividends instead of salary. No shares were ever issued, and no dividends were ever paid.
29. Subsequently, the first respondent suggested that the claimant work as a consultant for the second respondent rather than as an employee. The claimant took financial advice and rejected the suggestion of a consultancy due to the difficulties presented by IR 35. No consultancy agreement was ever entered. The claimant never issued any invoices to the second respondent for consultancy services.
30. The claimant did not work for anyone else during the relevant time.

31. The claimant gave evidence that she was concerned that if judgement were only awarded against the second respondent without a guarantee from the first respondent, then the second respondent would be put into liquidation to avoid meeting its liabilities to her. I asked the claimant if she had any evidence of a guarantee from the first respondent of the obligations of the second respondent. She confirmed that no such guarantee was in place.
32. The claimant did not know and was not able to produce evidence of how the payments made by the company to her had been treated in her own tax return.

Termination of Employment

33. In her form ET1, dated 11th May 2021, the claimant stated that her employment was continuing. In her schedule of loss dated 8th October 2021, the claimant claimed damages for failure to pay her for her 4 months' notice period required under the key terms. In the rule 21 referral the employment judge questioned why the claimant was claiming notice pay when her employment was still continuing. The claimant addressed this issue both in the bundle of documents admitted to the tribunal and in the oral evidence she gave to me.
34. The key terms of employment state that the claimant's employment will be subject to a four month notice period by the claimant or by the company.
35. Mr Muneeb's email of 6th June states that "I would like to get all the documentation on termination of Jelwan and your employment contracts".
36. On 29th June 2021, the board of directors passed a written resolution stating that "in view of the devastating impact COVID-19 who said on the company the directors have agreed that it is in the best interests of its creditors employees and shareholders to close the company down".
37. On 1st October 2021 Mr Nada Almutairi acquired a controlling interest in the second respondent.
38. Form TMO1 (filed at Companies House) states that the claimant's appointment as director of the second respondent was terminated on 7th November 2021.
39. After that date the claimant received an email from Mr Almutairi stating that she should hand over all documentation and social media as she no longer worked for the second respondent. Her access to emails and Microsoft Teams was terminated. The claimant was unable to provide a copy of that email as she no longer had access to her work email account.
40. The second respondent company is shown as still active on the Companies House register.

Holiday Pay

41. The key terms document states that the claimant was entitled to 25 days holiday per year plus bank holidays. The document does not refer to carrying over holiday entitlement. The claimant did not obtain agreement from either respondent in relation to carrying over unused holiday entitlement. The document does not specify a leave year.
42. I find that the claimant's leave year commenced on 1st February 2019.
43. During the first leave year, the claimant did not take any leave. She was getting the business established and was the only person working in the business. She did not feel she could leave the business to take a holiday. She was not told by either the first or the second respondent that she could not take holiday. She did not request holiday. The subject of holiday was never discussed.
44. During the second leave year, from 1st of February 2020 until 31st January 2021, the claimant did not take any annual leave. By this time there were three people working in the business. None of them took any annual leave during 2020. Due to the pandemic, it was necessary to make wholesale amendments to the way the business operated, including moving the business online. The extra work generated by the pandemic that meant that the claimant felt unable to take any holiday. In January 2021 the claimant tested positive for coronavirus and was in hospital on oxygen and a drip as she was struggling to breathe, had a fever and a rapid heart rate.
45. During the third leave year from 1st February 2021 until 7th November 2021, the claimant did not take any annual leave.

Law

46. Employment and worker status 39. An "employee" is defined by section 230(1) Employment Rights Act 1996 (ERA) as being "an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment." "Contract of employment" is defined as meaning a contract of service or apprenticeship. Whether an individual works under a contract of service is determined according to various tests established by case law. A tribunal must consider relevant factors in considering whether someone is an employee. An irreducible minimum to be an employee will involve control, mutuality of obligation and personal performance, but other relevant factors will also need to be considered.
47. A "worker" is defined by section 230(3) ERA as being:
- "an individual who has entered into or works under (or, where the employment has ceased, worked under)—
- (a) a contract of employment, or
 - (b) any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for

another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual.”

48. An employer will be in breach of contract if they terminate an employee’s contract without the contractual notice to which the employee is entitled, unless the employee has committed a fundamental breach of contract which would entitle the employer to dismiss without notice.
49. The aim of damages for breach of contract is to put the Claimant into the position they would have been in had the contract been performed in accordance with its terms. Damages for breach of contract are, therefore, calculated on a net basis, but may need to be grossed up to take account of any tax that may be payable on the damages. Damages relating to notice pay are subject to tax.
50. The maximum amount that a Tribunal can award a claimant is £25,000
51. Section 13(9) of the Employment Rights Act 1996 (ERA) provides that 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 a deduction. An employee has the right to complain to an Employment Tribunal of an unauthorised deduction from wages pursuant to section 23 ERA. The definition of “wages” in section 27 includes holiday pay.
52. The definition of “wages” does not include Employer’s pension contributions (University of Sunderland v Drossou [2017] IRLR 1087)
53. The Working Time Regulations 1998 provide for minimum periods of annual leave and payment to be made in lieu of any leave accrued but not taken in the leave year in which the employment ends. The leave year begins on the start date of the Claimant’s employment unless a written relevant agreement between the employee and the employer provides for a different leave year. There will be an unauthorised deduction from wages if the employer fails to pay the Claimant on termination of employment in lieu of accrued but untaken leave.
54. Carry over of annual leave requires an express right as the Working Time Regulations do not make any provision for carrying forward any unused leave from the 4 weeks’ leave into a following holiday year and the 1.6 weeks of statutory holiday can only be carried forward into the following leave year if a written agreement exists between the worker and the employer
55. The Working Time (Coronavirus) (Amendment) Regulations 2020, enable workers to carry holiday forward where the impact of COVID-19 means

that it has not been reasonably practicable to take it in the leave year to which it relates.

56. When considering whether it was not reasonably practicable for a worker to take leave as a result of the pandemic, so that they may carry untaken holiday into future leave years, an employer should consider various factors, such as:

56.1. whether the business has faced a significant increase in demand due to COVID-19 that would reasonably require the worker to continue to be at work and cannot be met through alternative practical measures

56.2. the extent to which the business' workforce is disrupted by the pandemic and the practical options available to the business to provide temporary cover of essential activities

56.3. the health of the worker and how soon they need to take a period of rest and relaxation

56.4. the length of time remaining in the worker's leave year, to enable the worker to take holiday at a later date within the leave year

56.5. the extent to which the worker taking leave would impact on wider society's response to, and recovery from, the pandemic

56.6. the ability of the remainder of the available workforce to provide cover for the worker going on leave

Conclusions

Employee

57. The claimant can only claim unauthorised deductions from wages and holiday pay if she was an employee or worker. She can only claim breach of contract if she was an employee.

58. All employees are workers, but not all workers are employees, so I start by considering whether the claimant was an employee as defined in section 230(1) ERA. 52.

59. The claimant worked as chief executive officer of the second respondent company. She was appointed as director of the second respondent. The key terms of her employment were recorded in a document sent by the first respondent to the claimant. She worked exclusively for the second respondent. All contracts she entered were in the name of the second respondent. She liaised with the first respondent but did not enter any contracts in the name of the first respondent. Although no deductions for tax and national insurance were made under the PAYE system, the second respondent was concerned that this could lead to potential liability to HMRC. These factors point towards the claimant being an employee of the second respondent.

60. She was paid by bank transfer. The payments came from various sources, including both the first and second respondent. The second respondent company filed dormant accounts up to April 2019 but was actively trading during this time. Whilst these factors could point to the claimant not being an employee of the second respondent, this is not enough, by itself, to outweigh the other factors which point towards the claimant being an employee of the second respondent.
61. Having regard to all relevant circumstances, I conclude that, even in the absence of evidence as to how the claimant treated such payments on her tax return, on the evidence before me, the claimant was an employee of the second respondent.
62. As the claimant is not employed by the first respondent, then in the absence of a guarantee, there can be no claim against the first respondent. I find no guarantee by the first respondent of the liabilities of the second respondent and the claim against the first respondent is therefore dismissed.
63. Since I have found that the claimant was an employee, she was also a worker and I do not need to consider any other part of the test of worker. As an employee, the claimant is entitled to pursue all her complaints against the second respondent.

Dismissal and Notice pay

64. The claimant was removed as a director of the second respondent on 7th November 2021. She subsequently received an email sent on behalf of the second respondent requesting her to hand over all documentation and social media as she no longer worked for the company. Access to emails and Microsoft Teams was terminated. I find that these actions, taken together, amount to a termination of the claimant's employment with the second respondent as from 7th of November 2021.
65. The claimant was entitled to four months' notice of termination unless she was guilty of gross misconduct. There is no evidence of gross misconduct.
66. I conclude that the Claimant is entitled to damages for the breach of contract. The intention is to put the Claimant in the position she would have been in had the contract been performed correctly, i.e., the position she would have been in had the second Respondent given her the 4 months' notice to which she was entitled.
67. Damages should take account of pay and contractual benefits that the Claimant would have received during the notice period.
68. Although damages are calculated on a net basis, since the Claimant will be liable for tax on the element of the notice pay relating to pay, I use the gross figure in the calculation.

69. The Claimant's gross monthly pay was $\text{£}135,000/12 = \text{£}11,250$. 4 months' loss of pay is $\text{£}45,000$.
70. The Claimant was a member of the second respondent's pension scheme. The employer's contribution was 8% of gross salary. 4 months' contribution would be $\times 8/100 \times \text{£}45,000 = \text{£}3,600$.
71. The total damages for breach of contract are, therefore, $\text{£}45,000 + \text{£}3,600 = \text{£}48,600$.
72. The maximum amount that a tribunal can award a claimant for a claim for breach of contract is $\text{£}25,000$ and damages are therefore capped at this figure.
73. The claimant will be responsible for any income tax or employee national insurance contributions which may become due on these damages.

Unauthorised deductions: Holiday pay

74. The Claimant's leave year ran from 1st February in each year.
75. The claimant was entitled to 25 days holiday plus bank holidays per year. The claimant was therefore entitled to 33 days' holiday per year.
76. I found that the claimant was employed until 7 November 2021.
77. The Claimant took no annual leave in the first leave year between 1 February 2019 and 31 January 2020. There was no express provision permitting her to carry over unused annual leave to the following year. The reason why she was unable to take her annual leave was because she was busy working for the business. However, she neither requested nor was she refused annual leave. I conclude that the claimant is not able to carry over annual leave from the first leave year.
78. The claimant took no annual leave in the second leave year between 1st February 2020 and 31st January 2021 because she had to reorganise the business structure due to the effect of COVID-19 on the business. The business' workforce was therefore disrupted by the pandemic. There were only three employees in the business at this time. The remainder of the available workforce was therefore not able to provide cover for the claimant going on leave. As the effect of the pandemic on the business continued throughout 2020 and the claimant was off work on sick leave during January 2021, there was no opportunity for the claimant to take leave later in the leave year. I conclude that it was not reasonably practicable for the claimant to take leave as a result of the pandemic and that she may therefore carry her 33 days' leave from the second leave year forward to the third leave year.
79. The claimant took no annual leave in the third leave year between 1 February 2021 and 7 November 2021. Her entitlement to leave for this period amounts to 25 days.

80. I conclude that the claimant was entitled to be paid, on termination of her employment, in lieu of 58 days' leave which she had accrued but not taken in the period 1 February 2020 to 7 November 2021. I found that the claimant had not taken any paid holiday in this period.

81. I conclude that the second respondent made an unauthorised deduction from wages by not paying her in lieu of 58 days' accrued leave. I have done the calculation as follows.

81.1. From 1 February 2020 to 31st March 2020, the claimant's salary was £150,000 gross per annum, which equates to £577 per day. Her annual leave for this period was 5.5 days.

81.2. The amount which should have been paid to the claimant in lieu of accrued but untaken holiday for this period is $5.5 \times 577 = £3,173.50$

81.3. From 1 April 2020 to 7th November 2021, the claimant's salary was £135,000 gross per annum. Which equates to £519 per day. Her annual leave for this period was 52.5 days.

81.4. The amount which should have been paid to the claimant in lieu of accrued but untaken holiday for this period is $52.5 \times 519 = £27,247.50$.

81.5. The total amount which should have been paid to the claimant in lieu of accrued but untaken holiday is $£3,173.50 + £27,247.50 = £30,421$.

82. I calculate the amount of payment on a gross basis, but the second respondent is entitled to make any deductions which are due for tax and national insurance contributions before payment is made to the Claimant.

Unauthorised deductions: Wages

83. From 1 February 2019 until 31 March 2020, the Claimant was entitled to be paid £150,000 gross per annum. On 1 April 2020, her salary was reduced to £135,000 gross per annum

84. I found that that she was employed by the second respondent until 7 November 2021.

85. She was not paid any salary from 1st February 2021 until the termination of her employment on 7 November 2021.

86. She should have been paid £2596 gross per week from 1 February 2021 until 7 November 2021, which is a period of 40 weeks. The total wages due for this period are $£2596 \times 40 = £103,840$

87. The claimant claimed employer's pension contributions for this period. As these do not fall within the definition of wages for the purposes of section 27 Employment Rights Act, no award is made under that Act in respect of pension.

88. In total, there was a deduction of £103,840 from the claimant's wages from 1 February 2021 to 7 November 2021.

89. I, therefore, conclude that the second respondent made unauthorised deductions of £103, 840 in total in respect of gross wages due from 1 February 2021 to 7 November 2021 and order the second respondent to pay this amount to the claimant.

90. The second respondent will be entitled to deduct any tax and employee's national insurance contributions due on this amount before payment to the claimant.

Employment Judge Atkins

Date: 27 April 2022

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