



EMPLOYMENT TRIBUNALS

Claimant: Miss Chenal Frederick
Respondent: Mixology Communications Ltd

By CVP

On: 11 April 2022
Before: Employment Judge Martin

Representation
Claimant: Ms A Scott - Counsel
Respondent: Mr T Sheppard - Counsel

RESERVED JUDGMENT

The judgment of the Tribunal is that:

1. The Claimant's claim for holiday pay succeeds
2. The Claimant's claim for notice pay succeeds
3. The Claimant's claim for unauthorised deduction from wages is dismissed

RESERVED REASONS

1. The Claimant presented a claim on 10 April 2021 claiming notice pay, holiday pay and unlawful deduction from wages. The Respondent defended the claims in its response presented on 12 May 2021. The Claimant withdrew a claim for expenses.
2. I heard evidence from the Claimant and from Mr Andrew Laxton. I had before me an agreed bundle comprising 291 pages.
3. The Claimant, Mr Laxton and Ms Jenna Petit-Keighley co-founded the Respondent. They were equal shareholders. Ms Petit-Keighley did not. The Respondent is a PR consultancy specialising in AgriTech, Wellness and Smart Living sectors. The Claimant was the Chief Operating Officer undertaking the finance role and the HR function and handled drafting and executing employee contracts. Mr Laxton is the Chief Executive Office. Ms

Petit-Keighley was the Managing Director. She resigned on 19 October 2020. The Respondent was incorporated in November 2019 and publicly launched in April 2020.

4. The Claimant was employed under a director's service agreement ("Service Agreement") dated 14 February 2020. This was just as the Covid-19 pandemic began. The pandemic had an inevitable effect on the business especially for such a new company as it could not attract external funding or generate new business. The three directors therefore had to consider ways to make the company more financially viable. At the centre of this case is what the terms were of an agreement made between the directors in late August 2020.
5. In August 2020, the Claimant suggested she sacrifice her salary. The other two directors also agreed to do this. This was to take effect from September 2020. The Claimant set out in writing on 28 August the financial benefit to the company of the salary sacrifice from September to December 2020. On 28 September 2020 Ms Petit-Keighley wrote a document giving the projected shortfall going forward from January 2021 and said it was not sustainable for the directors not to have a salary after January 2021. By 2 October 2020 both the Claimant and Ms Petit-Keighley were considering resigning as they could not sustain having no salary.
6. There was also an issue about a business loan Mr Laxton took out when the business started. The dispute was whether the Claimant and Ms Petit-Keighley were responsible for the business loan. The loan was taken out in Mr Laxton's sole name.
7. When the company was formed directors service agreements were drafted. The Claimant was responsible for the drafting and execution of this agreement. The Claimant liaised with the Respondent's solicitors. Mr Laxton signed the agreement. He assumed that his co-directors had also signed the agreement, but the Claimant did not sign it. She continued to work as a director after this date without raising any objection to the agreement, and therefore I find that by performance she accepted the director's agreement.
8. On 12 October 2020, the Claimant circulated a cashflow forecast showing the salary sacrifice through to January 2021.
9. On 19 October 2020, the Claimant and Ms Petit-Keighley resigned from their employment. The Claimant's resignation letter said:

"Dear Board of Directors

I am writing to inform you that I am tendering my resignation as COO of Mixology Communications Ltd and company director of Rebel3 Group and its subsidiaries. Following on from our ongoing discussions regarding the current and future financial sustainability of Rebel3 Group & Mixology Communications, I have come to the difficult decision that I can no longer carry out my duties as COO and company director and have no other alternative but to resign.

Unfortunately, given the current circumstances I can no longer agree and hereby withdraw any consent or agreement to the suspension of my salary as of today (19th October 2020). Therefore, my salary is now payable.....”

10. Attached to this was a document “*Terms of departure to be agreed.*” This provided for notice period to be agreed and approved by the board, a mutual agreement of payment of accrued salary from 1 September to 18 October 2020 and any untaken annual leave. The Claimant was willing to agree to a reasonable payment plan given the financial situation of the company.
11. Mr Laxton wrote to his fellow directors on 26 October in response to the Claimant’s comment in a payroll document that Director’s salaries should be reinstated. He said: “*I’ve just seen your note on payroll, we can’t reinstate Directors salary. All three of us collectively agreed to waive our salaries from September to year end and any change to that needs to be agreed by all of us*”.
12. Ms Peitit-Keighley’s responded on 27 October 2020: “*We will need to cover this off as one of the points for discussion at our WP meeting. As an individual employee, I withdrew my consent to suspend my salary as of the date of my resignation (19 October). It was a personal decision taken as an employee to agree to suspend my salary and health insurance from 1 September – taken prior to the realisation that I did not have a future with the company. It was therefore a personal decision to withdraw that consent – taken as an employee and does not require Board approval.*”
13. The Claimant replied to Mr Laxton on 27 October 2020 saying: “*As an employee I disagree with your email below regarding salary suspension. The agreement was personally made to suspend my salary and healthcare benefit and I have the right to withdraw my consent and have my salary reinstated*”.
14. The Claimant handed in her notice on 19 October 2020. The contractual period of notice under the Service Agreement is three months (clause 26.1). There is provision at 26.3 for the Respondent to make payment in lieu of notice at its discretion for all or part of the notice period. It says “Pay in lieu of notice will be calculated on the basis of basic salary only, and no holiday pay accrues for the notice period or remainder of the notice period (i.e., the period paid in lieu).
15. The issue for me to decide is whether there was an agreement to sacrifice salary or if it was an agreement to defer salary. If there was an agreement could it be rescinded unilaterally or did it require the consent of the whole board.
16. The Claimant was the first to say she would adjust her salary. Ms Petit-Keighley agreed and then it was put to Mr Laxton, and he also agreed. There are no minutes or notes of the meeting in August when this was agreed.
17. On 28 August, the Claimant provided a cashflow document with a covering email. In the email she refers to her taking a “*salary reduction*”. This was the fourth suggestion to cut costs. There was also a suggestion to stop

healthcare, which the Claimant and Ms Petit-Keighley decided to do. For personal reasons Mr Laxton did not stop his healthcare.

18. In her oral evidence the Claimant agreed she had used the word 'sacrifice' but said that what she meant was deferring salary. She agreed that her contract of employment provided that terms and conditions could be changed by agreement and that on 26 August 2020 there was a virtual meeting at which salary was discussed. In this meeting the Claimant used the word 'sacrifice'. She agreed that the discussion about salary was to keep the company afloat and that money would run out at a particular time. The Claimant was taken to an email she sent her fellow directors on 2 September where she said, "*Each director has personally agreed to sacrifice their salary from Sept 20 to EOY.*" The Claimant accepted in cross examination that anyone reading this would take it to mean sacrificed in its ordinary meaning i.e., to give it up. However, she maintained that the salary was not foregone, it was to be deferred but that there was no discussion as to when it was deferred to.
19. The Claimant was taken to contemporaneous documents, and it was pointed out that the word 'defer' was not used. She maintained that it was to be paid later. She said, "*I appreciate terminology not correct, when I say salary sacrifice I think of pensions, salary sacrifice schemes*". Even the Claimant's lawyers used the word 'sacrifice' in correspondence.
20. There is no formal agreement about the salary issue. I have considered all the surrounding documents and what the Claimant and Respondent said in evidence. The burden is on the Claimant to prove her claim. I find that given the Claimant used the word 'sacrifice', and given its normal meaning, that she intended to give up her salary. This agreement operated to vary the Service Agreement. As such another agreement was needed to vary it again. Mr Laxton did not agree.
21. On the balance of probabilities, I find that there was a binding agreement to sacrifice salary from September 2020 to the end of the year. The word 'sacrifice' has its normal meaning *namely "to give up something that is valuable to you in order to help another person"* (Cambridge English Dictionary). I considered whether the National Minimum Wage applied however does not apply to company directors.
22. There is a dispute as to whether holiday pay and notice pay should be payable even if monthly salary was not. I find that in the absence of any other agreement, the notice period to which the Claimant was entitled was three months as set out in the Service Agreement. I find that Mr Laxton imposed a leaving date on the Claimant earlier than the three months notice without her agreement. The payment in lieu of notice clause is set out above. I find the effect of this is that the Claimant is not entitled to notice pay for the period of notice to 31 December 2020 as she had agreed to sacrifice salary to that date. For the period after she is entitled to her salary. The Claimant gave notice on 19 October 2020. Her three month notice period therefore expired on 18 January 2021. She is entitled to pay for 18 days.
23. The Claimant is also entitled to accrued but untaken holiday pay for the

period of her employment up to September 2020. From that date she agreed a salary sacrifice. S27 Employment Rights Act 1996 includes holiday in the definition of wages. Therefore she is not entitled to holiday pay for that period when the salary sacrifice was in operation, i.e. September 2020 to the end of December 2020. She is not entitled to accrue holiday pay after the effective date of termination even though this was within the three month notice period by virtue of the provisions of the Service Agreement.

24. The Claimant's claim is therefore partially successful. The parties are encouraged to agree compensation between themselves. A remedy hearing will be listed in case they are unable to do so. If agreement is reached the parties must notify the Tribunal immediately.

Employment Judge Martin
26 May 2022