EMPLOYMENT TRIBUNALS

Heard at: Watford (by video) **On:** 14 and 15 July 2022

Claimant: Mr Brandon McLeod-Miller

Respondent: Made to Web Limited

Before: Employment Judge E Fowell

Ms J Costley

Ms I Sood

Representation:

Claimant In Person

Respondent Mr Simon Hoyle of Croner Group Limited

JUDGMENT

1. The following complaints are upheld:
    a. unlawful deduction from wages;
    b. breach of the Working Time Regulations 1998 in relation to outstanding holiday pay.
2. The following complaints are dismissed:
    a. constructive dismissal;
    b. breach of contract in relation to notice pay (on withdrawal);
    c. discrimination on grounds of sex;
    d. the employer's contract claim.
3. The claimant is awarded compensation as follows:

a. For unlawful deduction from wages, £6,833.75;

b. For holiday pay, £1,675.74

4. The total sum awarded is **£8,509.49**

REASONS

Introduction

1. Our unanimous decision is the claims for wages and holiday pay succeed but the other complaints are dismissed, including the employer's contract claim.

2. Mr McLeod-Miller worked for the company as a Senior Web Developer until his resignation, with immediate effect, on 30 March 2020. He said in his resignation letter that he was burnt out and had not been paid for the previous month.

3. In his claim form (ET1) Mr McLeod-Miller has ticked the relevant boxes for five complaints:

   a. unfair (i.e. constructive) dismissal;

   b. direct discrimination on grounds of sex;

   c. unlawful deduction from wages;

   d. notice pay;

   e. holiday pay.

4. Because he ticked the box for notice pay, which is a claim for breach of contract, the company was then entitled to bring its own claim for breach of contract in response, which they did, bringing the total number of claims to six. They say in their response form (ET3) that his claim form did not give a true account of events, and that he had failed to deliver on a core product, a website engine, after 7 months, even though he said at the outset that it would take a month. Essentially, it is a claim that Mr McLeod-Miller had been negligent and cost them over £10,000 in refunds or lost income.

Procedure and evidence

5. We have worked through these issues although the preparation for this hearing has been very last minute on each side. There was a case management order on 20 October 21, after a preliminary hearing, which gave directions for all the required steps, including exchange of witness statements by January this year, but it does not seem that the parties have been in touch with one another at any stage

or taken any notice of those orders.

6. The case management order made no mention of constructive dismissal, but Mr McLeod-Miller had less than two years' service and so cannot bring such a claim. He came to this hearing expecting that to be a live issue, and it is very unfortunate that this was not addressed earlier, but the fact is that without two years' service we have to dismiss it.

7. At the outset of the hearing Mr Hoyle, for the respondent, made an application of an adjournment. We dealt with that yesterday, but the basis of the application was that he had just been instructed. There was no explanation for that delay except that his company contacts respondents when the cause list is published. That did not in our view justify an extension of time after about two years of inactivity.

8. We also decided to proceed on the basis that this was listed for a two-day hearing, and was perfectly manageable in that time. In fact we delayed the start until 2pm to allow further time for preparation. It is essentially a claim for wages and holiday pay, with an employer's contract claim for poor performance and a claim of sex discrimination. The sex discrimination claim is also unusually short. Mr McLeod-Miller says that after his resignation he received £500 towards his arrears of wages, whereas a female colleague received more.

9. The employer's contract claim was more extensive. Mr Hoyle put it two ways. Firstly that the work done by Mr McLeod-Miller was negligent and secondly that he resigned in breach of contract. Only the first aspect about negligence was raised in the ET3 but we considered both. Mr McLeod-Miller gave evidence on the first afternoon. Then Mr Taimoor Chaudhary, the brother of the Managing Director, and himself a senior manager, gave evidence this morning.

10. Each side had prepared their own bundle. The respondent's, at 178 pages is much longer, but we had to refer to Mr McLeod-Miller's documents for his payslips. Having considered this evidence and the submissions on each side, we make the following findings.

Findings of Fact

11. The respondent is a small family business and Mr McLeod-Miller was the only employee. The female colleague just mentioned was a Ms Lewis, but she was self-employed, although Mr McLeod-Miller was not aware of that at the time. She helped Mr Chaudhury with sales. Mr McLeod-Miller was also supervised by Mr Chaudhury. They worked closely together and got on well. Hiring Mr McLeod-Miller was a major investment for such a small company but it allowed them to bid for fairly big IT projects.

12. Having recruited him they had to set up a payroll system to process his wages, and he began to receive monthly pay statements. A contract of employment was

drawn up although it was never signed. It provided for a salary of £55,000 per year, an curiously unspecified pension, a probationary period, three months' notice on his side and various restrictive covenants. Mr McLeod-Miller was not happy about these restrictions but otherwise worked under this contract of employment, starting on 9 September 2019.

13. At first he worked on a variety of small development projects. He was the main technical specialist. Mr Chaudhury was familiar with the type of work that Mr McLeod-Miller was doing, but the coding and software engineering was outside his outside his own area of expertise.

14. The main contract with which we are concerned was for a company or project called Prince Visa. It was a client based in London, who wanted a platform which could give advice to clients about visa and immigration matters. That is a very sophisticated system. It involves obtaining information from other sources online, a process known as data scraping, in order to respond to online questions. The client knew how they wanted the platform to look and function, they just wanted the technical side to be done for them. A fee of £16,000 was agreed, by way of three stage payments. Mr Chaudhury did the negotiating and discussed timing with the client. The rest was down to Mr McLeod-Miller.

15. As part of the client agreement they needed to do a demonstration or 'showcase' for the client in London. This was put off three times by the company because things were not ready. Mr McLeod-Miller and Mr Chaudhury went to London together in early February to showcase the system but it did not go well. The data scraper did not work when they needed it to, which was very embarrassing. After that Mr Chaudhury had to redouble his efforts to placate the client and hope that Mr McLeod-Miller had been able to sort out the technical problems.

16. We were taken through extensive day-by-day emails or WhatsApp messages between Mr McLeod-Miller and Mr Chaudhury, with Mr McLeod-Miller repeatedly saying that he needed another day or even an hour or so to finish off aspects of the work. Mr Chaudhury was very accommodating throughout. He kept fending off the customer and buying Mr McLeod-Miller the extra time he needed. However, the company also needed it to work, in order to get a stage payment and pay Mr McLeod-Miller his wages.

17. Wages were paid on the 10th of each month in arrears for the previous calendar month. He was paid for December on or about 10 January, although for some reason that payment was slightly short. Then he was paid for January on about 10 February, though we do not seem to have that pay statement. But on 10 March 2020 he was not paid. Nevertheless, he carried on working. It was made clear to him that he could not be paid until it was ready.

18. From the various messages we have seen, he was working at all hours, becoming

increasingly stressed. The data scraper tool was working but not fast enough for an impressive demonstration, but that was a result of the large amount of data being processed. It was not an easy problem to resolve and it all rested on Mr McLeod-Miller's shoulders.

19. Throughout this time there were some informal conversations between Mr Chaudhury and Mr McLeod-Miller about his attitude, which shades into performance, and one long closed-door session with the Managing Director, but there was no probationary review at any time and no formal steps taken about performance.

20. By the end of March Mr McLeod-Miller realised that a final working version was still some way off, and hence he was unlikely to be paid on 10 April, so he resigned. His resignation letter explained that the constant work was taking a toll on his mental health, that he had been asking for support and not getting any, that he had not been able to take any holiday during his time at the company and was burnt out. There was no written response, and no P45 was ever issued.

21. We accept that that left the respondent in a very difficult position. Mr McLeod-Miller had written a lot of code, and someone would need come in and take up the reins. Recruitment takes time, and it would take more time to master what had been done so far. So no one did come in. The company accepted that they could not supply the contract and they lost the business.

22. By then, the country had gone into lockdown. There were discussions about putting Mr McLeod-Miller on furlough but that came to nothing as he had not been on the payroll at the start of lockdown. The company also wanted to keep him on as a freelancer. That came to nothing too. At some stage in April he was paid £500, and at about the same time Ms Lewis was paid something over £1000 towards one of her invoices. Mr Chaudhury also mentioned in evidence that he gave £120 in cash, but as that was only mentioned in his oral evidence we cannot be satisfied on balance that that is correct.

Conclusions

Unlawful deduction from wages

23. The right not to suffer an unlawful deduction is contained in section 13(1) of the ERA:

> "An employer shall not make a deduction from wages of a worker employed by him unless—
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> (a) 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

(b) the worker has previously signified in writing his agreement or consent to the making of the deduction."

24. There was nothing in the contract to allow any deduction and no separate written agreement. Hence, there is no justification for withholding wages. My Hoyle urged us to find that there was a collateral contract, whereby Mr McLeod-Miller agreed to forego his pay until the project was complete, but it is not a matter of contract. It is a statutory right, and the statutory rules have to be met.

25. Nor is there any time limit issue. The last of the series of deductions was the non-payment for March, which was on 10 April. Mr McLeod-Miller had three months from then to bring a claim, plus the time spent in early conciliation (31 days). Hence the deadline was 31 days from 9 July, i.e. 9 August. The claim was submitted on 14 July 2020.

26. We asked Mr Chaudhury why the gross salary each moth was less than the figure for £55,000 a year (£4,583.33). He did not know and suggested that some deduction might have been made for unpaid holiday. That does not seem correct. Mr McLeod-Miller's case is that he had no holiday, save for bank holidays, and in any case such a deduction should be shown on the payslip. We conclude that there was an error in the payroll calculation.

27. We therefore include this clear shortfall in the assessment of the unlawful deduction from wages. Since the period without pay is less than three months there is no break in the chain and so no jurisdiction or time limit issue arises.

Holiday

28. The claim for holiday pay was ultimately not disputed (subject to the employer's contract claim) and the figure of 11 days' pay, identified at the preliminary hearing was accepted as correct.

Direct discrimination

29. The test under section 13 Equality Act is as follows:

(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

30. The question here is whether the company, in not paying him more than £500 in April, treated him *less favourably* than it treated or would have treated a woman in the same circumstances, i.e. Ms Lewis.

31. He suggested that the company may have paid her more because she had family obligations, and should if anything have given him preferential treatment as an employee, but the fact is that their circumstances were very different. The main point is that he had left. He was an ex-employee. Ms Lewis on the other hand

might leave, and they wanted to keep her. A further difference is that, rightly or wrongly, they felt that Mr McLeod-Miller had left them in the lurch, with an unfinished project and a good deal of lost income. That is more than enough to explain the difference in treatment and so we do not accept that sex played any part.

Employer's contract claim

32. The starting point here is that Mr McLeod-Miller was not being paid. Pay is fundamental, and even though he was striving to finish off this project, and knew that the company would have no money till it was done, he was not obliged to work without pay, and certainly had not agreed to do so indefinitely. That failure to pay him was a fundamental breach of contract by the respondent, entitling him to resign, so his resignation was not a breach of contract.

33. Was he negligent? There was certainly no real performance issue before he resigned and the company wanted to keep him on afterwards as a freelancer, if they could not persuade him to continue as an employee. The good relationship he had with Mr Chaudhury lasted after his resignation, at least until litigation was in prospect.

34. It is very unpalatable for an employer to criticise someone's performance when they are not being paid, and carrying on out of a sense of loyalty or to get paid for what has already been done. Although we were taken to many emails showing that again and again he needed more time, that simply shows us that it was a much bigger project than expected. There was no one else at the company to help with his work, or to comment on whether he was able to do it or was making mistakes. He was also clearly working all hours. In those circumstances it is unsurprising that his attitude changed to some extent in the final period. None of that shows to us that he was negligent in any way, or was stringing Mr Chaudhury along. Possibly he had bitten off – or been given – more than he could chew, certainly in the time available, but the commercial risk of employing someone at his level to compete for such work lies on the company. In a larger business such delays might be accommodated, or off-set against other gains, but in this small business with just one software developer, the risk did not pay off, and there is no basis to suggest that a non-negligent employee would have done all the work much earlier, so as to make Mr McLeod-Miller liable for this loss of business. We find the employer's contract claim to be without merit.

Remedy

35. We assess the compensation as follows. Mr McLeod-Miller was entitled to be paid £55,000 a year or £4,583.33 per month. In fact he was paid £4,371.79 a month, a shortfall of £211.54 per month before tax. The marginal rate of tax would have been 40% so that is a net shortfall of £126.92 a month.

36. That shortfall needs to be added to his pay for the months he worked. His first pay statement was for September 2019. That was a part month. He received a gross pay of £3,384.61 which is 77% of his normal monthly pay, so we will add 77% of the monthly shortfall - £97.73

37. Then there were six further full months, from October 2019 to March 2020. Adding £126.92 to each adds a further £761.52, amounting to £859.25 in total.

38. There was a further underpayment for December 2019. He received £4,160.25 before tax and national insurance, which was £211.54 too little. Again, applying a 40% tax rate, that was an additional underpayment of £126.92.

39. The missing pay for February and March 2020, at £3,173.79 per month, amounts to £6,347.58. Hence the total for unlawful deduction from wages is £7,333.75. Credit has to be given for the £500 paid, so the final figure is **£6,833.75**

Holiday pay

40. To calculate the holiday pay it is first necessary to calculate a day's pay. As already established, the net monthly figure of £3,173.79 was too short by £126.92 so the corrected figures should be £3,300.71. That corresponds to an annual net figure of £39,608.52, and on the basis of 52 weeks per year (260 days) the daily rate is £152.34. Hence, 11 days' holiday are worth **£1,675.74**

41. The total of those two figures is **£8,509.49**

Footnote

42. You can appeal to the Employment Appeal Tribunal if you think this decision involves a legal mistake. There is more information here https//www.gov.uk/appeal-employment-appeal-tribunal. Any appeal must be made within 42 days of the date you were sent these written reasons.

43. There is also a right to have the decision reconsidered if that would be in the interests of justice. An application for reconsideration should be made within 14 days of receiving these written reasons.

44. A decision may be reconsidered where there has been some serious problem with the process, such as where an administrative error has resulted in a wrong decision, where one side did not receive notice of the hearing, where the decision was made in the absence of one of the parties, or where new evidence has since become available. It is not an opportunity to argue the same points again, or even to raise points which could have been raised earlier but which were overlooked.

Employment Judge Fowell

Date 15 July 2022

JUDGMENT & REASONS SENT TO THE PARTIES ON

6 August 2022

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