



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Mr Avijnan Sinharay

v

Massive Analytic Limited

Heard at: Reading

On: 11 January 2023

Before:

Employment Judge Talbot-Ponsonby

Appearances:

For the Claimant: Mr Kawasar Zaman (C)

For the Respondent: No appearance

JUDGMENT having been sent to the parties on 4 February 2023 and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013, the following reasons are provided:

REASONS

Introduction

1. This is a claim by the claimant, Mr Avijnan Sinharay, against the respondent, Massive Analytic Limited, for wages and other sums that he says he has not been paid.

Claims and issues

2. The claimant was employed by the respondent from 14 December 2020 until he resigned with immediate effect on 29 April 2022. From June 2021 onwards, the claimant says that the respondent made a series of deductions from his pay, and failed to pay his pension contributions. Some months he was not paid at all, sometimes he was paid in part, and in October 2021 the claimant was paid in full.
3. The claimant claims these sums from the employer.
4. At the commencement of the hearing, it was agreed that the following issues required determination:
5. Preliminary issues
 - 5.1 Does the tribunal have jurisdiction in the light of the email dated 10 January 2023 (referred to at paragraph 9 below)
 - 5.2 Was the claim brought in time? It is now accepted by the respondent that it was

5.3 Was the claimant employed by the respondent? It is agreed that he was.

6. Substantive issues

6.1 Have there been deductions from the claimant's wages and, if so, was there a series of deductions?

6.2 Was there a lawful reason for the deduction?

6.3 Was any deduction agreed?

7 If the claimant is successful, the following will need to be considered by way of remedy:

7.1 Amount of unpaid wages

7.2 Pension contributions

7.3 Any consequential loss

Procedure, documents and evidence

8 The claim was heard in the Reading Employment Tribunal by me sitting alone, with parties attending by CVP. The claimant attended and was represented by his solicitor, Mr Jonathan Hare. The respondent did not attend.

9 On 10 January 2023, Mr George Frankou, the CEO of the respondent, wrote to the tribunal to say that the respondent was insolvent and would be filing a notice of intention to appoint an administrator within the following 24-48 hours, and would not be represented at the hearing.

10 If a notice of intention to appointment an administrator were filed, the effect of paragraph 44(2) of schedule B1 to the Insolvency Act 1986 is that an interim moratorium would exist, under which these proceedings would be stayed. I note from the file that the respondent has on two previous occasions filed notice of an intention to appoint an administrator but, on each occasion, no administrator has been appointed.

11 Notwithstanding the email from Mr Frankou, there was no evidence before the tribunal that the respondent had in fact filed notice of an intention to appoint an administrator. In the absence of any such evidence, it was appropriate for the hearing to continue.

12 The respondent did not attend. Notice of the hearing was sent to the respondent's solicitors by a notice dated 17 September 2022. The respondent's email of 10 January 2023 clearly indicated that the respondent was aware of the hearing and had chosen not to attend. In the circumstances, taking into account the overriding objective, I considered that it was in the interests of justice to proceed with the hearing in the absence of the respondent accordance with rule 47.

13 I had before me a bundle of documents prepared by the claimant, including in particular the ET1, ET3, the claimant's employment contract,

correspondence, and the claimant's payslips and schedule of loss. I also had a witness statement from the claimant.

- 14 I heard oral evidence from the claimant and submissions from Mr Hare, for which I am grateful.

Fact finding

- 15 The respondent is a company that provides data analysis services. The claimant was employed by the respondent from 14 December 2020 until he resigned with immediate effect on 29 April 2022. The claimant was first employed as "Centre of Excellence Head"; with effect from 1 May 2021, he was appointed as Vice President of Product Operations; he entered into a new employment contract with an annual salary of £125,000. The salary is set out at clause 8.1 of the employment contract.
- 16 At around this time, the claimant became aware that the respondent was suffering from cash flow difficulties.
- 17 In June 2021, the respondent did not pay the claimant's salary at all.
- 18 Thereafter, until January 2022, the claimant was paid some money each month. The claimant's schedule of loss indicates that in July, August, September, November and December 2021, there was a shortfall in what the claimant was paid. In October 2021 and January 2022, the claimant was paid in full and, in January 2022, the respondent paid a small amount towards the arrears of the claimant's salary.
- 19 In February and March 2022, the claimant was paid no money at all. The total arrears of salary are set out in the claimant's schedule of loss and amount to £55,084.34.
- 20 In addition to his salary, the respondent is required by clause 8.3 of the employment contract to pay an amount equal to the statutory minimum requirements of the claimant's gross basic salary into the respondent's pension scheme each month. Except in December 2021, when a limited contribution was made, the respondent did not do this.
- 21 The claimant repeatedly asked the respondent to pay his salary, and for details of when the arrears would be paid. The respondent gave repeated assurances that they would be paid but this was not forthcoming.
- 22 Mr Frankou did raise the possibility of giving share options to employees of the respondent, possibly in lieu of salary, but no details of this were given and no contract entered into.
- 23 After receiving no payments at all in February and March 2022, the claimant tendered his resignation on 29 April 2022 with immediate effect. By email dated 3 May 2022, Mr Frankou confirmed that he accepted the resignation.
- 24 By letter dated 6 May 2022, Bolt Burdon, the respondent's then solicitors, accepted that the claimant was owed the sum of £55,084.34 by way of arrears of salary and confirmed that the respondent would pay this to the claimant. They proposed that the sum be paid over 6 months commencing

in May 2022. Notwithstanding that it is now January 2023, the respondent has not paid any money to the claimant.

- 25 Accordingly, on 27 May 2022 the claimant entered early conciliation with ACAS, which concluded on 30 May 2022; proceedings were commenced in this tribunal on 21 June 2022.

Law

- 26 If an employee believes that his employer has made an unlawful deduction from his wages, he may apply to the tribunal. By section 23(2)(a) of the Employment Rights Act 1996 (“the Act”), any such application must be made within 3 months of the deduction, subject to any extension of time allowed for early conciliation pursuant to section 207B of the Act. Pursuant to section 23(2)(a) of the Act, if there is a series of deductions, the claim must be brought within 3 months of the last deduction in the series, again subject to any extension of time.
- 27 In Bear Scotland Ltd v Fulton [2015] ICR 221 (EAT) Langstaff J held that whether there is a series of deductions is a question of fact, requiring a sufficient factual and temporal link between the underpayments. He went on to say that there must be a sufficient similarity of subject matter, so that each event is factually linked, and a sufficient frequency of repetition. Any gap of more than 3 months between 2 deductions will break the series.
- 28 By section 13(1) of the Act, deductions from wages are unlawful unless they authorised by statute, by a relevant provision of the worker’s contract, or because the worker has previously agreed in writing. Section 14 of the Act sets out deductions that are excepted from section 13 , being a reimbursement of an overpayment of wages or of expenses, a certain other limited exceptions.
- 29 For deductions to be authorised under an employment contract (section 13(1)(a) of the Act), section 13(2) requires that the authorisation must be in a written contract that the employee has previously received or, if in other terms of the contract (whether express or implied and, if express, whether oral or written) the existence and effect, or combined effect, of which in relation to the worker the employer has notified to the worker in writing on such an occasion.
- 30 If the employer wishes to rely on the worker’s agreement under section 13(1)(b) of the Act, the written agreement must be obtained before the event giving rise to the deduction.
- 31 Wages are defined in section 27 of the Act. Section 27(1) “wages” means “any sums payable to the worker in connection with his employment” and then sets out a non-exhaustive list of what is included.
- 32 Section 27(2) excludes various payments from the definition of wages including, in particular, under section 27(c), “any payment by way of a pension, allowance or gratuity in connection with the worker’s retirement or as compensation for loss of office”. In the case of University of Sunderland v Drossou [2017] IRLR 1087), Slade J confirmed that employer’s pension contributions do not fall within wages as defined in section 27 of the Act.

- 33 As a matter of general contract law, if one party is in breach of contract, the innocent party may bring a claim against the other to recover any loss suffered as a result of that breach. The measure of damages is the amount required to put the innocent party in the position he would have been in if there had been no breach of contract, i.e. an obligation to pay the relevant sums.
- 34 Pursuant to section 3 of the Employment Tribunals Act 1996 and Article 2 of the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994, the tribunal has jurisdiction to hear a claim for damages for breach of contract by an employer if the claim arises or is outstanding on the termination of their employment.
- 35 Accordingly, to the extent that any of the amounts claimed by the claimant are not wages, the tribunal has jurisdiction to hear the claim as a breach of contract claim.
- 36 Pursuant to section 24(2) of the Act, if the worker has suffered financial loss attributable to the underpayment of wages, the tribunal may award such amount as it considers appropriate in all the circumstances to compensate the worker for that loss.

Conclusions

- 37 The preliminary issues have been addressed above. I now address the substantive issues

Have there been deductions from the claimant's wages and, if so, was there a series of deductions?

- 38 It is clear from the claimant's unchallenged evidence that the respondent has made deductions from the claimant's wages.
- 39 There have been repeated deductions, with 9 months from the first deduction to the last. There has never been a gap of more than three months between the deductions and the essential reason for the deductions given by the claimant, and not challenged by the respondent, was the same in every case: namely, that the respondent was suffering from cash flow difficulties and said that it could not afford to pay the claimant. I therefore find that this amounts to a series of deductions.

Was there a lawful reason for the deduction?

- 40 The reason given, of cash flow difficulties, is not a lawful reason under section 14 of the Act.

Was any deduction agreed?

- 41 Section 8.1 of the claimant's contract of employment obliges the respondent to pay the claimant monthly in arrears. The provides that the respondent will use reasonable endeavours to ensure the salary is paid on time, but will not be responsible if it is paid late because of bank transfer delays or other circumstances outside the respondent's control.

- 42 I do not find that the cash flow difficulties are circumstances outside the respondent's control.
- 43 Clause 10 of the contract permits the respondent to deduct the following from the salary:
- 43.1 amounts required by law to be deducted
 - 43.2 any sum that the claimant has previously agreed may be deducted
 - 43.3 any sums that the claimant owes the respondent
- 44 The respondent's cash flow shortfall does not fall into any of these categories. There was no evidence before me of any agreement by the claimant for the deductions to be made. Nor was this pleaded; paragraph 11 of the grounds of response states that the respondent explained to staff the difficulties it was experiencing, and that it would not be able to meet its payroll obligations, but this falls far short of asking the staff to agree to a deduction. Paragraph 17 of the grounds of response states, "The Claimant was aware of the reasons why the Respondent was not able to pay his full monthly salary payments and did not complain. The Claimant accepted the position [...]". Again, this falls far short of asserting that the claimant agreed to any deduction in writing.
- 45 Accordingly, I find that the deductions were not agreed.
- 46 Considering the remedy which is awarded, the claimant is entitled to the gross sum of £55,084.34 for deductions from his wages, as set out in his schedule of loss. He may need to account for tax and NI on this sum.
- 47 As set out above, the respondent is in breach of contract by failing to contribute to the claimant's pension, and the claimant is entitled to the sum of £487.47 as set out in the claimant's schedule of loss.
- 48 The claimant has sought interest on these sums but the tribunal does not have jurisdiction to award interest on a claim such as this.
- 49 The claimant confirmed in cross examination that he is working and will therefore pay higher rate tax on all sums received. He is awarded compensation of £2,500 in respect of the additional tax that the claimant will have to pay once the sums are received, calculated as set out in his schedule of loss.
- 50 Finally, the claimant sought an order that the respondent paid his costs of pursuing these proceedings in the tribunal.
- 51 Rule 76 of the Employment Tribunal rules provides, so far as relevant:

"76 When a costs order or a preparation time order may or shall be made

- (1) A Tribunal may make a costs order or a preparation time order, and shall consider whether to do so, where it considers that—
 - (a) a party (or that party's representative) has acted vexatiously, abusively, disruptively or otherwise unreasonably in either

the bringing of the proceedings (or part) or the way that the proceedings (or part) have been conducted; or

- (b) any claim or response had no reasonable prospect of success;
[or

[...]”

- 52 It is clear that the respondent had no reasonable prospect of success in these proceedings. Not only do the grounds of response as pleaded disclose no substantive defence to the claim, the letter from the respondent’s solicitors dated 6 May 2022 admitted that the arrears of salary were due and stated that the respondent would pay the relevant money to the claimant. No such payment has been made and the claimant has had to apply to the tribunal for judgment and has incurred costs in doing so.
- 53 In the circumstances, I consider it appropriate that to make an order that the respondent pay the claimant’s costs of these proceedings.
- 54 I do not have a schedule of costs, but I am told that the claimant has been invoiced the sum of £4,350 plus VAT by his solicitors, and counsel’s fees for today are £1,250 plus VAT. The claimant states that he expects to receive a further invoice from his solicitors but does not know the amount of this.
- 55 I therefore award the claimant his costs in the sum of £5,600 plus VAT, being £6,720, which I consider a reasonable amount.

Employment Judge Talbot-Ponsonby

Date: 13 July 2023

Judgment sent to the parties on

14 July 2023

For the Tribunal office