Case No: 2306216/2023

EMPLOYMENT TRIBUNALS

Claimant: Mr Nicholas Hedges

Respondents: (1) Ratcliff and Roper (Printers) Limited

(2) John Patrick Bywater

Heard at: London South (by CVP)

On: 18 March 2024

Before: Employment Judge Yardley

Representation

Claimant: In person

Respondent: Mr J P Bywater, director of the First Respondent

RESERVED REMEDY JUDGMENT

1. The claim as against the Second Respondent is withdrawn and dismissed, the First Respondent being the Claimant's employer.

2. By consent, under Rule 64, the total sum payable by the First Respondent to the Claimant is **£7,728.57** comprising:

    a. the sum of £3,802.68 gross in respect of unauthorised deduction of wages; and

    b. the sum of £3,925.89 gross in respect of breach of contract.

3. The Claimant has not proved that he is entitled to the monies he has claimed by way of breach of contract in respect of repayment of the Selina Finance and Funding Circle loans and no award to him is made.

4. The Claimant must account to HMRC for any sums he owes in respect of sums received from the First Respondent.

REASONS

Background

1. By a claim dated 9 November 2023, the Claimant claimed against the First Respondent and the Second Respondent in respect of the following matters:

    a. unauthorised deduction of wages in respect of sums owed for the period from 1 July 2023 to 31 July 2023 in the gross amount of £2,333.00;

    b. breach of contract in respect of payment in lieu of notice in the gross amount of £3,333.00;

    c. unauthorised deduction of wages in respect of the Claimant's accrued but unpaid holiday entitlement up to the date of termination of employment in the gross amount of £515.08;

    d. breach of contract in respect of unclaimed expenses in the gross amount of £592.89;

    e. unauthorised deduction of wages in respect of employee pension contributions in the gross amount of £954.60 that were not passed through to the pension provider NEST; and

    f. breach of contract in respect of payments to be made pursuant to a loan due to Selina Finance and Funding Circle relating to a personal guarantee provided by the Claimant.

2. Both Respondents failed to present a valid response on time and accordingly the Tribunal entered a default judgment in favour of the Claimant against the First Respondent in accordance with Rule 21 of the Employment Tribunals Rules of Procedure 2013 on 1 March 2024.

3. The matter was listed on 18 March 2024 to consider liability against the Second Respondent and the issue of remedy.

4. At the outset of the hearing, the Claimant agreed to withdraw his claim against the Second Respondent and the claim was dismissed. References to the Respondent in this judgement therefore relate to the First Respondent only.

5. The Respondent admitted that it had not made the payments to the Claimant as set out in paragraphs 1a. to 1e. above. The Respondent therefore agreed, by consent, that it would make such payments to the Claimant in the total sum of **£7,728.57.**

6. The Respondent however challenged the Claimant's claim set out in paragraph 1f. for breach of contract in respect of the repayment of a loan

owed by the Claimant to Funding Circle for which the Claimant had given a personal guarantee.

7. I reminded the parties that the purpose of the hearing was limited to remedy matters only and it was no longer open to the Respondent to attempt to re-argue matters relating to liability.

The Law

8. Mr Bywater attended for the Respondent. He is one of the directors of the Respondent. I considered whether I should allow him to participate in the hearing, given that a default judgment had been made against the Respondent. The default judgment had said that the Respondent would only be permitted to take part in the remedy hearing to the extent that I allowed.

9. I considered the decision of the Court of Appeal in **Office Equipment Systems Limited v Hughes [2018] EWCA Civ 1842** and decided that paragraphs 19 and 20 of the Judgment of Bean LJ were relevant to this case:

   19.“There is no absolute rule that a respondent who has been debarred from defending an employment tribunal claim on liability is always entitled to participate in the determination of remedy. At the lower end of the scale of cases employment tribunals routinely deal with claims for small liquidated sums, such as under Part 2 of the Employment Rights Act 1996 (still commonly called the "Wages Act" jurisdiction) where liability and remedy are dealt with in a single hearing. In such a case, a respondent who has been debarred from defending under Rule 21 could have no legitimate complaint if the employment tribunal proceeds to hear the case on the scheduled date, determines liability and makes an award. Even in that type of case it would generally be wrong for the tribunal to refuse to read any written representations or submissions as regards remedy sent to it by the defaulting respondent in good time, but proportionality and the overriding objective do not entitle the respondent to a further hearing.

   20.But in a case which is sufficiently substantial or complex to require the separate assessment of remedy after judgment has been given on liability, only an exceptional case would justify excluding the respondent from participating in any oral hearing; and it should be rarer still for a tribunal to refuse to allow the respondent to make written representations on remedy.”

10. Although this case was not complex, the amount claimed was substantial and I therefore decided that it was in the interests of the overriding objective to produce a just and fair hearing to hear from Mr Bywater.

Submissions

11. The Claimant submitted that the outstanding amount of the loans under which he had given a personal guarantee was £39,780. He said that it was a term of his employment contract that the Respondent had agreed to make payments under the loan and referred to a letter in the bundle dated 10 December 2021 between the Claimant and Mr Bywater which said:

"I am please [sic] to welcome you onboard with T&E Designs Ltd. Here are the terms on which we have agreed to go forward."

12. It also said:

"*Your package will be as agreed:*

- *£40,000 per annum of £3,333 per month;*
- *2.5% of all sales over £25,000 per month;*
- *20% of any profits of the division paid on an annual basis 3 months in arrears;*
- *Payments will still be made to funders for loans whereby a personal guarantee has been given by either yourself or Stuart*."

13. The Claimant referred me to a copy of a standing order confirmation from Barclays Bank dated 27 January 2022 in the bundle which purported to set up a standing order from "*PDF GP*" to "*Funding Circle Limited*". The standing order was in the amount of £2,600 and was due to start on 21 February 2022 with a final payment of £1,614.23 due on 19 May 2023.

14. The Claimant said that so far only two payments had been made against the loan but was not able to confirm when those payments had been made. The Claimant said that he had only became aware of the non-payment when the bailiffs had visited him. He thought it had probably been about a year since payments had been made. He said the reason he hadn't raised it when he was still employed is because he believed that the payments would eventually be made by the Respondent.

15. Mr Bywater said that the reason he had not responded to the original ET1 was because he had not received notice of the original claim.

16. Mr Bywater explained that the Claimant had previously owned a business called Mandatum Ink Ltd which had been acquired by T&E Designs Ltd ("**T&E Designs**). As part of the transaction, Mr Bywater (in his role as director of T&E Designs) agreed to help the Claimant make payments under a loan taken out by Mandatum Ink with Funding Circle and under which the Claimant had provided a personal guarantee. Mr Bywater submits that this was not a term of Claimant's employment.

17. Mr Bywater said that after trading for a short period, the business was not viable and a decision was taken to close T&E Designs down. Following the closure, efforts were made to save some parts of the business. The poster side of the business was absorbed by the Respondent and the Claimant was offered employment with the Respondent. Mr Bywater says that the Claimant's new offer of employment was separate to that of his previous employment with T&E Designs and that he was employed on a new contract. He said the new contract was for a trial period of 3 months and did not include

any commitment to continue making payments on the loan. He said that after the three month trial period had expired, the Claimant's employment was terminated.

18. Mr Bywater explained that the reason the Claimant had not received his final pay upon termination, was because a customer that the Claimant had brought on board had failed to pay his invoice. My Bywater said he blamed the Claimant for non-payment and withheld his wages. He accepted this was wrong.

19. After hearing representations from the Respondent, I asked the Claimant on what date his employment with T&E Design had terminated and on what date it had commenced with the Respondent. He said he did not know and had not received any P45 or P60 in relation to his previous employment with T&E Design. He did however say that his employment between T&E Design and the Respondent had been continuous and there had been no break in employment. This was disputed by Mr Bywater who said there was a gap.

20. I then asked the Claimant whether he still expected the Respondent to continue making payments in respect of loan even after his employment had ended. He replied that he did on the basis that the Respondent continues to run the accounts acquired from Mandatum Ink and benefit from the loan.

Findings of Fact

21. Having carefully considered the submission from both parties, I find that there was an agreement between T&E Designs and the Claimant under which T&E Designs agreed to make payments under certain loans taken out by Mandatum Ink Ltd pursuant to which the Claimant had given a personal guarantee. This is evidenced by the letter dated 10 December 2021. In particular, by stating that payments will "still" be made to funders for the loans, this indicates that payments had previously been made by T&E Design even though no evidence of such payments was submitted.

22. However neither party was able to confirm the date on which the Claimant's employment with T&E Design ended or the date on which the Claimant's employment with the Respondent had commenced. Both parties agree that the Claimant was employed by the Respondent at some point and that the period of employment was for at least 3 months but do not agree whether the employment was continuous or not.

23. I have therefore been unable to satisfy myself based on the evidence before me, whether or not the term by which the Respondent agreed to pay the loan on behalf of the Claimant was a term of the new employment contract.

24. It may well be the case that the Claimant's employment transferred to the Respondent under the Transfer of Undertakings Protection of Employment Rights (TUPE) legislation, and therefore such term did transfer with the Claimant. However this was not pleaded and no evidence has been adduced to confirm this. Accordingly I am unable to find that a TUPE transfer has occurred.

25. Further, even if the Claimant's employment did transfer under TUPE, the Claimant has not provided documentary evidence regarding the loan. In particular he has not provided details of the amount of any repayments made in respect of the loan, the dates on which those payments were made and/or the total amount outstanding.

Conclusion

26. The Claimant had a default judgment on liability only and was required to quantify his loss and substantiate the quantum of his claim. Whilst the Respondent has agreed to pay an amount in respect of unlawful deductions of wages and breach of contract (in respect of other loss), it disputes the amount claimed in respect of the personal guarantee.

27. The Claimant has not provided documentary evidence regarding any payments made in respect of the loan, the dates on which those payments were made and/or the total amount outstanding. Whilst he has provided a copy of a standing order confirmation, this does not prove how many payments were made and when.

28. Given that the burden of proof is on the Claimant to prove their loss, and the Claimant has failed to discharge the required standard of proof, no award is made.

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Employment Judge Yardley

Date: 18 March 2024