Case number: 6001198/2024

EMPLOYMENT TRIBUNALS

BETWEEN:

Claimant		**Respondent**
Mr Benjamin Bradley	And	The Bigger Fish (UK) Limited
		(Formerly known as The Bigger Fish UK Services Limited)

AT A FINAL HEARING

Held: Nottingham **On**: 12 November 2024

Before: Employment Judge R Clark (Sitting alone)

REPRESENTATION
For the Claimant: Mr Benjamin Bradley in person
For the Respondent: Mr Dominic Webb, Director

JUDGMENT

1. The claim of unauthorised deduction from wages **succeeds.** The claimant is entitled to this declaration and compensation. The respondent shall pay the claimant compensation in the nature of the wages deducted in the gross sum of **£9,986.04.**

2. The claim of breach of contract **succeeds.** No separate award of damages is made as the claimant is fully compensated for his loss in the compensation ordered in the unauthorised deduction from wages claim.

3. The Respondent's application for a preparation time order (Costs) is **refused**.

REASONS

1. Application for Written Reasons

1.1 These reasons were given orally at the conclusion of the case. Mr Webb applied for written reasons. Whilst that is a request that a party can currently make as of right, I would have granted it even if it had been a matter of my discretion as it is likely that the findings and conclusions I reached are relevant to the civil claim in the County Court.

2. Parties

2.1 This section is recorded post hearing. The day after the hearing, Mr Bradley contacted the tribunal to inform it that the respondent had changed its name. The respondent took an unusually formal and combative approach to its response objecting to that application. I have recorded the respondent's name in its current and former manner above. That will avoid any technical issues should the claimant need to enforce the judgment. As a legal entity, the company exists virtue of its incorporation and its company number. The respondent, as now named, is the same legal entity that employed the claimant. It has simply changed the name by which it is known.

3. Preliminary Matters

3.1 This is a short track hearing and, consequently, has not been subject to case management beyond basic standard directions for sequential service. There is no bundle. During the course of the morning of trial, it was necessary to spend a great deal of time clarifying the documentation before me and isolated that which was being relied on by the parties as their evidence. The extensive inter-party correspondence has swollen the tribunal file to some 365 pages. Although it took some time, that exercise resulted in a degree of clarity. There was an issue about the claimant's delay in serving his evidence according to the orders, but exchange did it take place on 3 June and there is no injustice in proceeding in the contested hearing today.

4. Issues

4.1 We spent a similarly lengthy period of time identifying the issues of fact and law. The dispute centres on the interpretation of a clause in the contract of employment that in certain circumstances entitles the employer to terminate with immediate effect and to pay the employee in lieu of notice, offsetting any pay due by any earned in new employment.

5. Settlement discussions

5.1 The process of identifying those issues appeared to narrow the areas of disputes to such an extent it appeared they may be able to resolve matters by agreement. Time was allowed over an early lunch for that purpose. Settlement is always in everyone's interest, but it was particularly so in this case because the parties are also involved in county court small

claims litigation relating which overlaps almost entirely with the issues in this claim. Unfortunately, they were unable to reach common ground, and the trial was heard during the afternoon session.

6. Evidence

6.1 I heard evidence from Mr Bradley and Mr Webb. I considered the documentation each submitted in support of their claim or defence.

6.2 The value of full scrutiny of the evidence is illustrated in this case as the initial basis on which the parties might have entertained settlement, was not in fact supported by the evidence.

7. The Facts and Conclusions on the Central Issue

7.1 The claimant accepted a job paying £45,000 per annum gross. He started in January 2024, resigned on 24 January with notice that would have taken his employment up to 24 March 2024. The bottom line in this case is that in the relatively short period that Mr Bradley's employment contract subsisted, he didn't get paid. He didn't get paid in accordance with the terms of a very detailed written contract of employment which provides for monthly pay, in arrears. At some point between that contract being signed in September 2023 and before the employment actually commenced, a discussion took place about changing that term as to payment of salary. The proposal was to change it from the standard term mentioned, to a wholly unusual one of payment of 3 months at a time, in advance. The claimant agreed to that proposal. Who wouldn't?

7.2 However, it seems no detail was agreed as to when that payment would be made. By definition, a payment in advance has to be made at or before the start of the pay period to avoid being immediately in breach. It certainly wasn't paid on or before 1 January 2024 when the respondent says the employment commenced. It didn't happen at any later point either. It didn't happen on 5 January. The significance of that date is that Mr Webb says he had to account quarterly pay to align with the accounting practises of HMRC. Mr Webb could not really explain that requirement but, in any event, it didn't lead to Mr Bradley getting paid, even though a part payment payslip was prepared for around £600. Nor did Mr Bradly get paid on 15 January in accordance with the original written terms for monthly pay, should they have somehow been restored. He didn't get paid at any point thereafter.

7.3 So far as there needs to be a finding as to the start date, I don't go behind the respondent's contention that it was 1 January. Mr Bradley was under the impression that it was 2 January. He understandably formed that belief based on written communication from the respondent which suggests the original contract start date of 18th of January would actually be brought forward to 2 January. That may have been poorly drafted to mean the actual first day at work, as opposed to start of the contract, but in view of other aspects of this case I prefer to categorise that as one of a number of inconsistencies between the way the respondent advanced its case, and the contemporaneous written documentation.

7.4 The absence of payment understandably caused Mr Bradley financial difficulties. He and his family were already in receipt of Universal Credit to some degree. The respondent's payroll system provided real time reporting of the employees' tax affairs. As a result, not only was Mr Bradley disadvantaged by not actually receiving the pay that the pay slips stated he was due, but his tax affairs were adjusted meaning his Universal Credit payments were reduced.

7.5 There are disputes as to what pay was reported to HMRC when, but I don't need to go into that in detail. There was one payment certainly reported at some point during January of £618 relating to the part period up to 5 January. There is also a pay slip of £11,250 which Mr Bradley did not see at the time but did see another one in the same amount in February.

7.6 It is no surprise that this all became a cause of additional stress for Mr Bradley who, early on in this relationship, formed the view that he could not continue with the breach of contract. He contacted the respondent on 24 January to tender his resignation. There is no dispute that the mutual notice due under the contract was 60 days which, at that time of the year, the respondent says amounted to two full months. There is also agreement that Mr Webb invited the claimant to think about it over the next few days and that the claimant responded to that invitation on 29 January to say: -

> ***I'm still wanting to hand my notice in I'll send it in an e-mail today***

7.7 Mr Webb replied the same day with a message saying: -

> ***It's fine. No need to let me get a letter to you - be later tonight/tomoz. Just saying it's been mutually agreed, we are paying you through march and keep the laptop. ties all loose ends up***

7.8 It seems clear to me that if this had been written in a more formal context, there would be a full stop after "no need to". The response to that is a thumbs up reaction from Mr Bradley.

7.9 I explored the reference to "mutually agreed". Mr web says he didn't mean it in the sense that the ending of the employment was by mutual consent but simply that they were both in agreement with what was happening at the time. In other words, the relations were still civil between the parties in a way that soon after this date they would deteriorate significantly.

7.10 A key point for me to decide in this case whether the claimant was ending the employment by resigning, or whether the employer was ending it by dismissing. There is nothing in this text exchange that talks about dismissal or termination by the employer. Mr Webb's point about how mutually agreed was meant and used does not engage the very specific legal meaning. On the other hand, the texts do talk about resignation, and about handing in notice.

7.11 The parties have repeatedly stated today that all were aware of the contractual term as to notice so it's perhaps appropriate then to look at clause 17. It provides for the 60 days'

notice. The next paragraph of clause 17 needs setting out in full because it is that which is relied on by the respondent. It says: -

> ***We reserve the right in our absolute discretion to terminate your employment at any time and with immediate effect by paying your basic salary in lieu of your notice or the remainder of such. We may choose to make this payment in lieu of notice by equal monthly payments to you until the date that your notice would have expired and had notice being given. The monthly sum due to you will be reduced by any income that you receive from alternative employment. You will inform us of any such income.***

7.12 That has hallmarks of being drafted by a lawyer's hand for a number of reasons. First, if an employer terminates immediately and pays in lieu of notice, there is no right to delay that payment which in the absence of any contractual terms is in any event simply an advance payment of the damages that might be recovered. This term contracts to provide the ability to pay it in instalment payments after the termination date although that clause in itself doesn't really engage in the facts of this case as no payments were made at all. The second point is that a contractual right to pay in lieu of notice effectively changes the payments paid under it from the advance settlement of damages for breach of contract, to a liquidated sum under the contract. In other words, it is a contractual bargain to pay wages in the form of a contractual payment in lieu of notice. The significance of that is that the duty to mitigate loss that would arise in pursuit of a damages claim, does not arise against a liquidated sum. The term engages directly with the contractual obligation of the claimant in such circumstances to credit against the amount due, any income received from alternative employment, effectively putting in place a duty to mitigate that would not exist at common law.

7.13 All that aside, the key part of this term, however, is that it engages only on the exercise by the employer of the terms of its opening clause (we reserve the right in our absolute discretion to terminate your employment …). I accept, as Mr Webb says, that that term could be deployed in a situation where the employer of its own motion decided to bring the employment relationship to an end, but it could also arise when, as is advanced here, the employee resigns and then the employer decides to terminate during what would have been the employee's notice to bring forward the date of termination. The clause also does not require termination in such circumstances to be for the entirety of the notice period. It is clear it is capable of operating for part of the period and from a later date.

7.14 One difference between the offset provision in this term, and the general duty to mitigate at common law, is that the offset expressly applies only to income from alternative employment. There is no dispute that whilst Mr Bradley's Universal Credit increased to some degree during the time that he was either out of work or not being paid, that income would not engage this clause. Only new employed income would. It is also common ground that there was such alternative employment obtained but that was not until 11 March 2024. The pay the claimant received from his new employment for March was £2089.41 gross. That of course was for the part month from 11 to 31 March. The day rate for those 20 days of employment equates to £104.47. But not all of that would engage clause 17 if the clause is otherwise engaged. That is because it applies only for the notional period of notice which in this case would expire on 24 March (not 31 march). Accordingly, a pro rata adjustment is necessary

for the 14 days between 11 and 24 March. That gives a figure of £1462.59 gross to potentially offset.

7.15 There is no dispute that the two months in the notional period of notice equated to an entitlement to £7500 gross pay and so it is possible to calculate with relative simplicity the amount that remained due to the claimant if clause 17 engages.

7.16 The real question is whether it did engage. When the parties explored settlement this morning, it was on an assumed basis that it would. Mr Bradley's evidence confirmed all of the basic calculation matters and the key events until, that is, we got to the question of termination. He simply did not understand that he was being dismissed. To be fair, the way the employer conducted itself it is understandable why he would not be sure what was happening but his belief in his resignation is reinforced not only in the texts referred to already, but the email sent by the employer about a month later on 24 February which explicitly said: -

> ***Hi Ben,***
>
> ***As discussed previously we've agreed to end your employment with the company.***
>
> ***P45***
>
> ***Your leaving date will be 20 March 2024. Your P45 will reflect this date***

7.17 I do not have the P45. Mr Bradley located it and confirmed it does indeed state 20 March 2024. The next heading in the email is "notice". It says: -

> ***we have agreed that you are not required to work your notice. And are not required to remain on gardening leave as such you're free to seek other employment immediately***

7.18 It then talks of wages being paid as payment after leaving payments and that any outstanding pay slips will be sent by e-mail to you. It concludes with a heading of "return of company equipment". It says Mr Webb will organise a date and time to collect the company laptop, SIM card and business visa business debit card if it hasn't been disposed of already later next week.

7.19 Nothing in that email says that the employment has been terminated. There are reference points such as the reference to not being required to remain on gardening leave and being free to seek other employment which might hint at something unusual going on. If, as it asserts, the claimant was dismissed by the employer under clause 17 in response to his own resignation at or around 24 January 2024, the question is why this email does not simply say so. I do not have the positive evidence of an earlier termination, as one would expect, the high point for the respondent is an invitation to infer from the vague terms referring to garden leave, not working and payment being "after employment payments" that there was a termination. The difficulty with that is that it arises immediately after an explicit, clear and unambiguous statement that the leaving date will be 20 March. At the date of this e-mail the employment relationship had continued for about a month and it was contemplated it would continue to do so for about another month thereafter. Bluntly, I can't accept the evidence

before me shows there was a termination dismissal by the employer on the 24 January, or at least to take effect from that date. The conclusion that I have to reach is that the claimant resigned, the employment relationship continued for most of the 60 days' notice. In fact, it only ended early to the extent that it did end on 20 March instead of 24 March.

7.20 The claimant's wages between 1 January and 24 January were not paid. He is entitled to claim as he does that that is an unauthorised deduction from wages. The gross figure for that period is £2903.23. He is then entitled to his 60 days' notice. The employment relationship continued for most of that meaning that the claimant is entitled to wages during that period. After 20 March he is entitled either to a liquidated sum under the contract in accordance with clause 17 or damages for breach of contract. The pay for that 60 days' notice would be a gross payment of £7500.

7.21 The respondent cannot rely on clause 17 second paragraph for the entirety of that period to offset all the employment income earned in that period as there was no dismissal, initially at least. Its claim to offset is therefore reduced substantially. There was, however, a termination expressed in the email of 24 February which had the effect of bringing the employment to an end on 20 March, 4 days earlier than required by the notice. Clause 17 does potentially then engage, but it is only in respect of those final four days that the rest of clause 17 can engage. That amounts to an offset of £417.88.

7.22 I say potentially because it seems highly likely that this was not, in fact, a clause that the respondent was entitled to rely on when had been in a fundamental repudiatory breach of contract for failing to pay wages and when Mr Bradley had accepted that repudiation by giving his resignation, albeit with notice. Even then, however, there would still be damages for premature termination and Mr Bradly would then be under the common law duty to mitigate such that there is no practical difference. On either analysis, all that means the amount due to the claimant in gross figures would be £10,403.22 less £417.18 resulting in a gross sum due of £9986.04.

8. Costs application (preparation time order)

8.1 Mr Webb maintained his written application for a preparation time order. We explored the factual and legal basis for that. It had two limbs. One was that the claimant was late in serving his evidence. The other was that the claimant had not accepted an offer of settlement of £8017. The first was said to engage costs under rule 76 due to a failure to comply with an order of the tribunal. Both were put as amounting to conducting the proceedings unreasonably.

8.2 I declined to make an order. There was a delay in the claimant getting the documents to the respondent. He explained, as was stated in correspondence at the time, that he was labouring under a mistaken belief that he had attached them to an earlier email. He did provide them by 3 June, some two months before this hearing. The documents were exchanged in time to prepare for this hearing, and I can't see that anything surprising arose from the claimant's case once received, but in any event, I am not being told that there was

any attempt by the respondent to expand or add to its documentation. I cannot accept that his error is sufficient to amount as unreasonably conducting the proceedings, but even to the extent it could be, it would only then engage a discretion to make a costs order which in the circumstances I wouldn't exercise.

8.3 The second limb relates to the offer to settle. The figure of £8017.95 was arrived at by calculating a gross entitlement which, it is right to say, is in excess of the gross figure that I arrived at because it includes accrued holiday as well as wages, which is a claim not before me. The respondent also calculated the contractual pay more generously on a working day basis rather than salary as I did. On the other hand, it seeks to make greater deductions from the sum than I have found were due. In short, it arrives at a figure nearly £2000 less than the figure I ordered. That difference in itself would seem to me to be enough grounds for any party to refuse an offer without that refusal engaging the concept of unreasonably conducting the proceedings. I do accept Mr Webb's wider contentions that I can infer from some earlier comments that there was at sometimes some misplaced belief on the claimant that he might still be entitled to three months in advance *in addition* to any notice although that fell away quickly. The claimant has still nonetheless beaten the offer.

8.4 The threshold for costs isn't engaged simply because an offer to settle is beaten or not. It may well be that an offer to settle does exceed the amount of judgment, but the circumstances of the rejection of an offer need to be seen in the totality of the case. It may still be reasonable to have refused an offer that isn't beaten. There may be cases where an offer is rejected, the party presses on and obtains judgment for a marginally better amount, but the context could mean that conduct was unreasonable. The totality of the circumstances, the form and terms of the offer and the reasons for its rejection all factor in the mix. In other words, I could have given judgment for less than £8017 and it may still have been reasonable for the claimant not to accept the offer.

8.5 In this case, there were other terms that needed consideration. There is a 50% share of costs being claimed from the costs of the county court action which looks like it's in the order of about £900. I don't know what those costs are they might be issue and other court fees, they might be legal costs, but the costs of small claims are tightly controlled. There appears to be good reason not to accept this offer against what the actual recoverable costs are in that jurisdiction.

8.6 In any event, the claimant has beaten the offer so on neither basis am I satisfied the threshold in rule 76 is engaged and, even if it is on one or both of the gateways, the justice of this case does not tip in favour of exercising a discretion to order the claimant to pay the respondent's costs. I have to say on this point, that the respondent brought this action on itself. At the end of the day, this claimant didn't get paid. I sense that the employer has attempted to erect a smoke screen of justification to excuse its failure to pay its employee. None of the points it raised amounted to anything. It was in its gift to put money in its employees' banks and account for it and that simply never happened at any point during the time in January that they there was actually have worked undertaken, or at any point in the

two months that followed. The balance of hardship or the justice between the parties on which a discretion ought to be exercised would tip firmly against making the order that is sought.

EMPLOYMENT JUDGE R Clark
DATE 20 November 2024

JUDGMENT SENT TO THE PARTIES ON

……22 November 2024……

FOR THE TRIBUNALS

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