RA

EMPLOYMENT TRIBUNALS

Claimant: **Mr William Hall**

Respondent: **London Basket Ball Club (UK) Limited**

Heard at: **East London Hearing Centre**

On: **14 and 15 February 2019**

Before: **Employment Judge Hallen (sitting alone)**

Representation

Claimant: Mr N Marshall (McKenzie friend)

Respondent: Mr V Macaulay (Managing Director)

JUDGMENT

The unanimous judgment of the Employment Tribunal was that: -

1. The Claimant was constructively wrongfully dismissed and also had unlawful deductions of wages made from his salary. The Respondent is ordered to pay the sum of £3150.00 in respect of unlawful deduction of wages with an uplift of 15% of £472.50, making the total of £3622.50.

2. Due to his constructive wrongful dismissal the Respondent is ordered to pay the Claimant fourteen days compensation in the sum of £1050.00 with a 15% uplift of £157.50, making a total of £1207.50.

3. The Respondent failed to provide the Claimant with statutory written particulars of his terms and conditions of his employment and is ordered to pay the sum of two weeks' pay in the sum £1050.00.

4. The Respondent failed to pay the Claimant holiday pay at the termination of his employment in the sum of 1.2 weeks at a total of £581.54 with a 15% uplift of £87.23 in respective of the ACAS code of practice, making a total of £668.77

in respect of unpaid holiday pay.

5. The Respondent is ordered to pay a total amount of £6,548.77.

6. The Respondent's counterclaim against the Claimant is dismissed as the Respondent was in breach of contract and is not entitled to make a counterclaim against the Claimant as a consequence of such breach. The breaches identified above in 1 and 2 were fundamental breaches of contract in respect of the Respondent's failure to pay the Claimant his wages.

REASONS

Issues

1. The Claimant presented his Claim Form on 16 April 2018 and the Respondent presented its Response Form on 20 May 2018. Th claim was listed before a judge sitting alone on 14 and 15 February 2019. The Claimant made various claims in his Claim Form. These related to unlawful deductions of wages for January 2018 to 14 February 2018, which was the date of his resignation. The Tribunal had to ascertain whether the Claimant was entitled to wages as an employee of the Respondent during this period of time and to ascertain what the total amount of such wages were?

2. The Claimant also claimed constructive wrongful dismissal, in that the Respondent failed to pay him his wages for January 2018 to 14 February 2018. The Claimant asserted that this was a fundamental breach of contract entitling him to resign. The Tribunal had to ascertain whether the failure to pay wages by the Respondent during this period of time was a fundamental breach of contract. If so, did the Claimant resign as a consequence of such breach? In addition, the Tribunal had to decide upon the correct amount of damages owed to the Claimant for such constructive wrongful dismissal.

3. Thirdly, the Claimant asserted that the Respondent failed to provide him with full particulars of his terms and conditions of employment pursuant to S.1 of the Employments Rights Act 1996 (ERA). The Tribunal had to ascertain whether such particulars were provided to the Claimant and whether they were in compliance with S.1 of the ERA 1996 insofar, as there was a breach to provide such terms and conditions of the employment. The Tribunal had to ascertain whether the Claimant was entitled to a minimum of two or a maximum of four weeks' pay for such breach.

4. Finally, the Claimant asserted that he as an employee was entitled to holiday untaken at the time of his termination. The Tribunal had to ascertain whether as an employee, employed under a contract of employment the Claimant was entitled to holiday or holiday pay for the relevant period of his employment and to ascertain the amount due and owing to him.

5. The Claimant at the Tribunal hearing withdrew his claim for breach of s.8 of the ERA relating to his claim for particularised wage slips.

6. The Tribunal had before it a bundle of documents prepared by the Claimant which contained the substantive documentation as well a supplementary shorter bundle of documents prepared by the Respondent. The parties agreed after a short adjournment that the Respondent's documentation should be inserted without reference being made to 'without prejudice' correspondence contained therein.

7. The Tribunal also had in front of it a witness statement for the Claimant and a witness statement in respect of Vince Macaulay; the Respondent's managing director. Both of these witnesses were subject to cross examination and questions from the Tribunal.

Facts

8. The Claimant was employed as an employee under a contract of employment which was at page 123 of the Claimant's bundle of documents. He signed the contract of employment on 23 August 2017 and commenced at the Respondent's training camp at the Queen Elizabeth Olympic Park on 8 September 2017 which was the start of his continuous service. The Claimant was employed as a professional basketball player, playing for the Respondent in the British Basketball League.

9. The contract of employment at page 123 of the bundle of documents contained some of the requisite information required by S.1 of ERA but the Claimant noticed that it did not contain the dates upon which his continuous employment began, did not contain terms and conditions relating to his hours of work , did not contain terms relating to holiday entitlement including public holidays and holiday pay, did not contain information relating to pensions and pension schemes and did not contain the principal place of work.

10. The Respondent in evidence accepted that the Claimant was an employee of the Respondent employed under a contract of employment. However, the Respondent could not explain satisfactorily why the contract provided to the Claimant failed to specify any of the above requisite requirements. It appeared that the contract provided to the Claimant was a proforma contract provided to all clubs in the British Basketball League which had been adapted for use by the Respondent.

11. In addition, the Respondent was not able to satisfactorily explain why the Claimant was not provided with paid holidays or paid holiday entitlement at the termination of his employment in respect of holidays not taken. The best the Respondent could say was that no professional basketball players were entitled to holiday entitlements. This appeared to the Tribunal to be a breach of the Working Time Regulations 1998 in that all, employees employed under a contract of employment are entitled to take holidays and to be paid any accrued holiday entitlement at the termination of their employment.

12. Under clause 29 of the Claimant's contract of employment he was entitled to receive a monthly salary of £1800.00 net of tax, as well as a monthly accommodation allowance of £300.00 net of tax. The Respondent did not dispute this entitlement which was specified in the contract of employment, which was at page 123 of the Claimant's bundle of documents.

13. In respect of the Claimant's working hours, these would change week to week depending on the clubs and game schedule. On average, commonly he would train for two hours a day for five days and play one or two games a week. An away game would mean that he would be required to work anywhere between seven to eighteen hours, taking into account travel time and game time. The Claimant also coached a youth club on behalf of club for ninety minutes each week. The Tribunal accepted the Claimant's evidence that he would on average work twenty hours per week.

14. On 3 January 2018, Mr Macaulay spoke to the Claimant about reducing his salary. He had gathered all the players together along with the assistant coaches and told them due to poor performance, the head coach had been dismissed and all of the wages of the basketball players would be reduced. Mr Macaulay said that this was a result of a sponsor pulling out due to a poor run of form by the club. Mr Macaulay then invited the players to have a one-to-one meeting in the café at the Queen Elizabeth park where the club played its home games.

15. During the meeting with the Claimant, Mr Macaulay told him that although he did not know by exactly how much, the Claimant's salary would be reduced. He told the Claimant that if he was not happy with the proposal to reduce the wages he would pay the Claimant's his salary for January and then he could leave the club. The Claimant told Mr Macaulay that he enjoyed playing for the club and that he was disappointed to hear of the situation. He asked Mr Macaulay to put what he had said in writing via an email. He said that he would speak to his family and friends about the situation and get back to him. The meeting lasted ten to fifteen minutes in total.

16. Mr Macaulay sent the Claimant an email on 3 January 2018 stating that he was proposing to reduce the Claimant's salary by £200.00 a month (about 11%) from £1800.00 net of tax £1600.00 net of tax. This email was at page 232 of the Claimant's bundle.

17. Although the Claimant appreciated the situation the club was in, he decided that he could not accept the cut to the salary that the club wished to impose because the cost of his rent and other day to day costs. The Claimant telephoned Mr Macaulay of 7 January 2018 to tell him that he did not agree to the reduction and sent him a follow up email confirming the same later that day. This email was page 234 of the bundle. The Claimant also let Mr Macaulay know what he was fit and available to play in the game against Sheffield Sharks scheduled for that day. The Claimant sent Mr Macaulay a text message to let him know that he had emailed him and to ask for his response. Mr Macaulay replied by text to confirm that he would not play the Claimant in the match against Sheffield Sharks.

18. On 8 January, the Claimant's agent Mr Pascual sent Mr Macaulay an email to say that the Claimant would keep practicing and attending the games with the same professional attitude, no matter if he played or not and that he expected to be

remunerated according to the original terms of the contract. Mr Macaulay replied on 8 January setting out the options for the Claimant which were either to take a pay cut or receive a one-month payment of 'redundancy'. However, the Claimant's view was that he had made an agreement in the contract about what he should be paid and he expected the club to honour the agreement.

19. During the following two weeks there was various email correspondence and text messages between Mr Macaulay and the Claimant, where the Claimant confirmed that he wished to practice and play his games as part of his contractual duties and Mr Macaulay refused to allow the Claimant to attend or practice any games that were scheduled. The Claimant during this period confirmed that he was fit and willing to do so.

20. Finally, on 28 January, Mr Joe Ikhinwin (the clubs captain) removed the Claimant from the clubs "WhatsApp" group which was a way of corresponding between the players in respect of team and club matters. This included when and where training would take place and the arrangements about games. Without being a member of the WhatsApp group, the Claimant would no longer know these details.

21. The Claimant emailed Mr Macaulay on 28 January 2018 to tell him that he had been removed from the WhatsApp group. Given that he had been removed from the group and because Mr Macaulay had over the previous weeks told him not to attend practice or games he told Mr Macaulay that despite this instruction he was still available to play for the club as well as attend training. Mr Macaulay did not respond to this email, which was at page 252 of the bundle of documents.

22. At the hearing, the Respondent confirmed that the Claimant had been paid up until December 2017 and that these payments included £1800.00 net tax per month, in terms of salary and £300.00 in respect of accommodation allowance. The Respondent confirmed that no wages or accommodation allowance was paid to the Claimant from January until the date of the Claimant's resignation on the 14 February 2018.

23. As consequence of such failure, under clause 29(c) of the Claimant's contract of employment the Respondent was required to pay the Claimant's salary and accommodation allowance by no later than the fifth day of the following month. The Claimant realised on 5 February 2018 that he had not been paid his salary or accommodation allowance for January and he emailed Mr Macaulay on the same day to ask him why this had not been paid. This was at page 253 of the Claimant's bundle.

24. Clause 29(c) gave the Respondent a further period of seven days to rectify the situation and pay the missing amounts. Mr Macaulay did not reply to the Claimant's email of 5 February 2018 and as a consequence the Claimant decided to raise a formal written grievance with the Respondent about the unpaid wages for January as well as the unpaid accommodation allowance. He sent the grievance letter to Mr Macaulay on 7 February 2018 which was at page 255 to 258 of the Claimant's bundle of documents.

25. Mr Macaulay did not acknowledge or respond to this grievance letter by 12 February 2018. As a consequence, the Claimant decided to email Mr Macaulay on 13 February to say that he was very concerned about this situation and asked to speak to him urgently to arrange for the payment of the salary and accommodation allowance owed to the Claimant for January 2018. This email was at page 259 of the bundle of documents. The Respondent did not arrange a grievance meeting or deal with the Claimant's legitimate grievance in respect of failure to pay wages. The Respondent at the Tribunal hearing said that it did not need to this as through Mr. Macaulay had already been talking to the Claimant about the club's difficult financial situation. As a consequence, it did not believe that it needed to arrange a grievance meeting. The Claimant had not given his prior consent to the Respondent withholding or deducting sums from his salary and accommodation allowance for January 2018 or at all.

26. The Claimant worked hard during his time at the club doing everything that was asked of him. He worked well with his team mates and got on well with everyone at the club. Mr Macaulay had not allowed the Claimant to undertake his job and had separated him from his teammates. The Claimant was unable to train and had not been paid for the efforts and work he put in. The Claimant believed the Respondent was treating him unfairly by not paying him his contractual wages and accommodation allowance. He was legitimately worried about what would happen to the rest of his season and whether he would be paid again. He was also worried that if this continued he would lose form and fitness for a lack of practice and game time. He was worried about his reputation being damaged as he was unable to explain his situation to others whilst under contract with the club.

27. Due to the missing pay, the Claimant had to reluctantly borrow money from his family as he could not afford his rent in London. The salary and accommodation allowance was his only source of income. As a result of this, he sent Mr Macaulay an email on 14 February 2019 attaching a letter in which he resigned claiming constructive dismissal. This was at page 261 to 267 of the bundle of documents. This set out the full reasons why the Claimant was resigning including constructive dismissal as well as a request for the Respondent to pay him his unpaid salary and accommodation allowance for January 2018 and the period from 1 to 14 February 2018, being the date on which the Claimant resigned and which was the effective date of termination. The main reason for his resignation was because he had not been paid by the Respondent which he found to be entirely unacceptable.

28. Clause 24 of the contract of employment at page 126 of the Claimant's bundle of documents confirmed that if the club was guilty of a serious or persistent breach of the terms and conditions of the contract, the player was able to terminate the contract by serving a notice of termination to take effect after fourteen days, on the club.

29. Clause 22 of the contract also contained a clause which permitted the club to terminate the contract on fourteen days' notice if the player was guilty of persistent gross misconduct or serious breaches of the rules of the club or provisions of the agreement.

30. On 16 February 2019, Mr Macaulay replied to the Claimant's email and letter of resignation stating, "He did not accept the Claimant's version of events and would revert." Mr MaCaulay never reverted to the Claimant and as a consequence the

Claimant commenced these proceedings.

Law

31. S.13(1) ERA 1996 sets out the following: -

31.1 "an employer shall not make a deduction from a wage of a worker employed by him unless;

31.1.1 the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the workers contract;

31.1.2 the worker has previously signified in writing his agreement or consent to the making of the deduction"

32. S.207(A)(1) Trade Union and Labour Relations (Consolidation) Act 1992: "(TULR (C)A 1992" states that: -

32.1 "this section applies to proceedings before an Employment Tribunal relating to a claim by an employee under any of the jurisdictions listed under Schedule A2'.

33. The jurisdictions listed in Schedule A2 TULR (C)A 1992 include: -

33.1 S.23 of Employments Rights Act 1996 (unauthorised deductions and payments).

33.2 The Employment Tribunal Extension of Jurisdiction (England and Wales) Order 1994 (SIA994/1623) (Breach of employment contract and termination).

33.3 S.207(A)(2) TULR (C) A 1992 states: -

33.3.1 "if, in the case of proceedings to which this section applies, it appears to an employment tribunal that-

33.4 the claim to which the proceedings relate concerns a matter to which a relevant code of practice applies;

33.5 the employer has failed to comply with that code in relation to that matter;

33.6 that failure was unreasonable;

33.7 the Employment Tribunal may, if it considers just and equitable in all the circumstances to do so, increase any award it makes to the employee by no more than 25%".

34. The approach an Employment Tribunal should take when considering a claim for constructive dismissal was summarised in the case of *Kaur v Teaching Hospitals NHS* (2018) EWCA CIV 978 as follows: -

"In a normal case where an employee claims to have been constructively dismissed it is sufficient for a tribunal to ask itself the following questions:

34.1 What was the most recent act (omissions) on the part of the employer which the employee says caused, or triggered his or her resignation?

34.2 Has he or she affirmed the contract since that act?

34.3 If not, was that act (omission) by itself a repudiatory breach?

34.4 Did the employee resign in response to that breach?"

35. S.1 ERA requires the employer to provide an employee with written terms and conditions of employment which must contain requisite specified information.

36. S.38 Employment Act 2002 applies to proceedings before an employment tribunal relating to a claim by an employee under any of the jurisdictions listed Schedule 5 to the Employment Act 2002. Schedule 5 confirms unauthorised deductions (S.23 ERA) and payments owed in respect of breach of contract under the Employment Tribunal Extension of Jurisdiction Order 1994.

Tribunals conclusions

37. In this case, the Respondent admitted that it did not pay the Claimant his wages for January and February. The reason for this was due to the fact that it could not afford to do so and attempted to renegotiate the wages and benefits for the Claimant along with other employees employed by the Respondent.

38. The Respondent accepted that the last payment made by the Respondent to the Claimant was on 4 and 8 January 2018 in respect of the period worked by the Claimant in December 2017. The Respondent instructed the accountant retained by it not to make the January wages and accommodation allowance payments to the Claimant and the Claimant was not paid wages and accommodation allowance for January and up to the date of his resignation on 14 February 2018. The total amount of these payments for January and February was £3,150.00.

39. The Claimant did not accept the Respondent's reasons for failing to pay the Claimant his contractual entitlements and the Respondent's failure to pay such entitlements was both a breach of contract and an unlawful deduction of the Claimant's wages. The Respondent was under a misapprehension that he could stop paying the Claimant his contractual entitlements and it appeared that the Respondent conducted itself during this period without taking appropriate legal advice.

40. As stated above, the failure to pay wages and benefits that were contractually due and owing to an employee whereby an employee does not consent to a variation in his contract of employment would amount to a breach of contract and would also be an unlawful deduction of wages.

41. Had the Respondent taken appropriate legal advice at the relevant time it is likely that this advice would have confirmed that the Claimant should be paid the

wages that were due and owing. If the Respondent did this, it would not have ended up in the position that it ended up in.

42. Nevertheless, the Respondent did act in the way that it did and this was in breach of the law. The Tribunal finds that this breach was due to a misapprehension of the law rather than a wilful attempt not to pay the Claimant what was rightfully owed to him.

43. Accordingly, the Tribunal uplifted the award by 15% and awarded the Claimant a total £3622.50 in respect of unlawful deductions of wages and breach of contract in respect of wages for January and February. The uplift in this regard was due to the Respondent's failure to conduct a grievance meeting as required by the ACAS Code of Practice which the Claimant asked for and which the Respondent failed to undertake.

44. As stated above, this failure was due to a misapprehension of the law and the Respondent's belief that it was discussing the Claimant's contract via other negotiations that were ongoing at the time.

45. The Respondent's failure to pay the Claimant his contractual wages and benefits also amounted to a constructive wrongful dismissal. The Respondent's failure to pay the Claimant his wages and benefits triggered his resignation after the Claimant lodged a grievance by letter dated 12 February 2018. The Respondents failure to deal with that grievance and/or rectify its breach by paying wages and benefits lawfully due and owing pursuant to the contract amounted to a repudiatory breach of contract which the Claimant acted upon two days later (14 February) by resigning and thereby not accepting the breach.

46. A failure to pay wages is a fundamental breach of contract entitling the Claimant to resign which the Claimant did. As a consequence, the Respondent was not able to make a counterclaim for breach of contract as it was in breach of contract itself. At the point of the Claimant's resignation due to a fundamental breach of contract the parties no longer owed any contractual duties to each other. As such, after 14 February 2018 the Claimant could not have been in breach of contract by taking up employment with another company. Accordingly, the Respondent's counterclaim against the Claimant was dismissed.

47. The Claimant argued that he should be compensated for the remainder of his contract of employment which was stated to be for an entire season and that he should receive wages and benefits up and including 20 May 2018 which was the end of the season. The Claimant argued that there was no general right to terminate the contract of employment on notice and therefore the constructive wrongful dismissal of the Claimant on 14 February meant that the Claimant should be paid for the rest of the fixed term contract, namely until the end of the season on 20 May 2018 being the final game of the season.

48. However, the Tribunal did not accept this argument. The contract of employment contained Clause 24 which confirmed that the Claimant had the right to terminate the contract of employment on the giving of fourteens days' notice in respect of a serious breach of contract by the Respondent.

49. Clause 24 stated "if a club is guilty of a serious or persistent breach of the terms and conditions of the contract, the player may terminate this agreement by serving a notice of termination to take effect after fourteen days on the club'. This in the Tribunals mind was a specific to the circumstances of this case in respect of failure to pay wages and benefits.

50. Accordingly, the Tribunal awarded the Claimant fourteens day loss of wages for the notice period in the sum of £1050.00 to which an uplift of 15% in the sum of £157.50 was awarded and the total amount of this payments is £1207.50.

51. The Tribunal noted that the Respondent acted through ignorance and without malice, believing that that it was following the correct course of action in respect of attempting to vary the Claimant's contract of employment. Unfortunately, the Respondent failed to follow the correct procedure and this was more due to ignorance then any wilful or egregious actions of the Respondent.

52. It was clear to the Tribunal that the contract at pages 123 was an attempt by the Respondent to provide written particulars of the main terms and conditions of employment to the Claimant. However, these terms were deficient and did not comply with the requirements of S.1 ERA 1996. It was clear to the Tribunal that the Respondent attempted to follow the guidance given to it by its professional association but unfortunately the proforma contract did not comply with the requirements of S.1 ERA.

53. The contract was absent of some important particulars such as holiday entitlement and holiday pay, there was no reference to the date of the start of the continuous employment and no reference to any pension entitlement or pensions scheme applicable to the Claimant. There were also other failures including the failure to state the principal place of work and whether the Claimant was required to work outside the United Kingdom for more than one month. The Tribunal found this to be a failure to comply with the S1 ERA and accordingly the Claimant was entitled to a remedy under s38 of the EA 2002. The Tribunal exercised its discretions and due to the Respondent's ignorance of the law and its effort to follow what it believed to be the law, the Tribunal awarded the Claimant two weeks in the sum of £1050.00.

54. With the regard to holiday pay, the Respondent's position was that although the Claimant was an employee he was not entitled to holiday as professional basketball players did not take holiday. Unfortunately for the Respondent this was not the legal position. A worker is defined under Regulation 2(1) of the Working Time Regulations 1998. The Claimant was clearly a worker and indeed was an employee from 8 September 2017 to 14 February 2018 being the date of his resignation.

55. It was accepted that the Claimant did not take holiday during this period of time and the Tribunal found that the Claimant worked an average of twenty hours per week. The Claimant's holiday entitlement should be pro- rated to reflect his twenty hours per weeks (twenty hours divided by forty hours) and the entitlement claimed by the Claimant in his Schedule of Loss should be divided by two. Accordingly, the Claimant is awarded £581.54 in respect of holiday entitlement which is to be uplifted by 15% (£87.23) and the Claimant is awarded a total payment of £668.77 in respect of

unpaid holiday entitled at the termination of his Employment.

Employment Judge Hallen

13 March 2019