



EMPLOYMENT TRIBUNALS

Claimant: Miss V. Olatunji

Respondent: LEXefiscal LLP

Heard at: London Central (CVP) **On:** 9 May 2022

Before: Tribunal Judge Peer acting as an Employment Judge

Representation

Claimant: In person

Respondent: Mr Zahir Mo of Herefords Solicitors

JUDGMENT

1. The claim for holiday pay is dismissed upon withdrawal.
2. The claimant's claim for breach of contract (wrongful dismissal) fails.
3. The claimant's claim for breach of contract (notice pay) succeeds as the respondent was in breach of contract by failing to pay the claimant notice pay in lieu of notice when due. The claimant did not suffer any consequential loss arising from the late payment and is therefore not entitled to any award of damages for the breach of contract.
4. The claim for unauthorised deduction from wages fails and is dismissed.

REASONS

1. A request for written reasons having been made in accordance with Rule 62(3) of the Employment Tribunal Rules of Procedure 2013 at the hearing where reasons for the above judgment were given orally, the Tribunal provides the following:

Claims and Issues

2. The claimant claimed breach of contract in respect of wrongful dismissal and failure to pay notice pay; holiday pay; and unauthorised deduction of

wages in respect of an unpaid bonus. The claimant also claimed unfair dismissal in her claim form. The claims were presented in time.

3. On 29 April 2021, Employment Judge Glennie directed that the claim for unfair dismissal be struck out on the basis that the claimant did not have sufficient qualifying service to bring such a claim. EJ Glennie declined to list a preliminary hearing to consider case management of the outstanding claims on the basis that it was more effective to have a single hearing to dispose of the claims. The claims were listed for a one day hearing on 9 May 2022.
4. The hearing was conducted as a remote hearing by way of Cloud Video Platform. There were no objections raised to the format of the hearing and the hearing proceeded effectively as a remote hearing.
5. The parties accept that the claimant was an employee of the respondent and that she worked for the respondent from 24 May 2021 until termination of employment on 11 November 2021. Therefore, the claimant has the necessary status of employee/worker and thus eligibility to bring her claims before the tribunal. The respondent asserts in its response that all sums owed to the claimant have been paid.
6. As the claimant was not legally represented, I carefully explained the process, visited the issues and explained the law when discussing the relevance of the evidence. This was to ensure that the claimant was not disadvantaged as a litigant in person.
7. At the outset of the hearing, the parties discussed the claims and the issues for determination.
8. After discussion, the claimant withdrew her claim for holiday pay and it is accordingly dismissed upon withdrawal. The claimant did not dispute that she had taken 4 days leave during the time she was employed and accepted the respondent's calculation that she had accrued 13.5 days leave at the termination date. The claimant further accepted that the respondent's payment of £950 in lieu of 9.5 accrued but untaken days of leave meant she had been paid in full in respect of her entitlement to holiday pay.
9. The claimant also accepted at the outset that she was entitled to a period of one month's notice and that she had now been paid in full in lieu of that period of notice. The claimant stated at the hearing that she had suffered consequential loss arising from late payment in the amount of £367.52. The claimant confirmed that she considered she was entitled to a bonus payment of £4000. The respondent stated that the claim for consequential financial loss had not been particularised in the pleadings nor the amount previously stated. The respondent however helpfully conceded that payment was due on 1st of the month in accordance with the contract of employment and payment was made late.
10. The issues for the tribunal to consider were discussed and agreed. The issues to be determined were:
 - a. In relation to the claim for breach of contract, did the claimant suffer loss attributable to the late payment?

- b. In relation to the claim for unauthorised deduction of wages, what is claimed? The claimant claims entitlement to a bonus of £4000.
- c. Is the bonus 'wages' within the definition of wages at section 27 of the Employment Rights Act 1996? The respondent says this was a discretionary bonus and not wages but in any event the claimant was not entitled to any bonus on the basis of the entitlement as set out in the contract.
- d. Has the respondent made a deduction of the sums claimed?
- e. Was the deduction authorised?
- f. Or, can the respondent show a relevant exemption applies?

Procedure, documents and evidence heard

- 11. I heard evidence from the claimant and Dr Frank of the respondent on affirmation. The claimant did not provide any written statement. A written statement of Dr Frank was produced to me on the day of the hearing. The claimant had received and read the witness statement in advance of the hearing.
- 12. There was a bundle of documents produced by the respondent indexed to 147 pages. I asked the parties to refer me to documents they wished me to consider. The documents in the bundle included the pleadings and correspondence from the tribunal, the claimant's contract of employment, correspondence between the parties, claimant's payslip and claimant's bank statements together with other documents.

Fact findings

- 13. Having considered all the evidence, I found the following facts on a balance of probabilities.
- 14. The parties will note that not all the matters that they told me about are referred to. That is because I have limited them to points that are relevant to the legal issues requiring determination.
- 15. The respondent runs a boutique tax firm and employed the claimant as an office administrator between 24 May 2021 and 11 November 2021. The claimant was provided with a contract of employment.
- 16. The claimant's contract of employment provides relevantly that:
 - a. The claimant was subject to a three month probation period extendable at discretion of the employer if a longer period is required to evaluate performance notified in writing with one week's notice at any time during probation;
 - b. The claimant's basic salary of £26,000 was 'payable by equal monthly instalments in arrears on or about the 1st of each month' and 'you will also be entitled to a gross bonus of £4000 subject to you achieving targets that are mutually agreed upon'.
 - c. 'At any time during your employment or upon its termination (howsoever arising) the Employer will be entitled to deduct from your salary, or from any other payment due to you in respect of your employment, any monies due from you to the Employer'.
 - d. The contract can be terminated upon one month's notice during the

first five years of continuous employment and the employer had discretion to provide pay in lieu of notice.

17. The claimant said in evidence that at her interview she wanted and asked for a salary of £30,000 but this was not within the respondent's budget. The contract reflects the agreement of basic salary of £26,000 with a bonus provision.
18. In evidence the claimant said that she completed the tasks she was set and at no point received any warning or notice that she was not performing. The claimant also said that on occasion she could not complete tasks as she had to wait for approval and that on occasion tasks set for her were given to others such as a task related to an office move.
19. During cross-examination, the claimant agreed that paragraph 3 of her particulars of claim were correct. Paragraph 3 of the claimant's particulars of claim set out that 'It is written that I would receive a bonus once targets had been met (after probation) that were agreed upon in the beginning, but this was never discussed again which was meant to be my initial salary.'
20. The claimant said that the targets were the tasks set and agreed every day as no targets were specified in the contract. She said the contract just says reach the agreed targets. She referred to the wording as 'open'. The claimant explained that she thought that when a long standing project was agreed that was a target in her eyes. The claimant also stated that targets were not discussed or set. The claimant met Dr Frank for the first time in person during October 2021. The claimant said that not having time to discuss targets was not a good enough reason and that it should not be her job to chase the employer for something that was stated in her contract. The claimant said that she still did not understand what she should have done to obtain the bonus.
21. In evidence Dr Frank said that no targets were discussed or agreed. Dr Frank said that if they had discussed targets, a target could have been set related to a structured plan to implement improvements in the efficiency of the administrative function of the company. Dr Frank said that the claimant's work to sort out files was a task which was part of her everyday role.
22. On 11 November 2021, the respondent notified the claimant orally that her employment was terminated with immediate effect. A letter dated 11 November 2021 sets out that her last working day was 11 November 2021 and she would be paid up to 30 November 2021 with pay in lieu of accrued but untaken leave.
23. On 15 November 2021, the claimant raised a grievance as to the reason for the termination of employment.
24. On 18 November 2021, the respondent wrote to the claimant and stated that the claimant was still under probation and that she was being paid for two weeks' notice although was only entitled to one week's notice as per her contract. The letter is inaccurate as the claimant was not on probation at that point and the contract provides for one month's notice.
25. On 19 November 2021, the claimant presented her claim to the employment

tribunal.

26. On 24 November 2021, the respondent sent the claimant a further letter which itemised the payments that would be made to her as : £900 in respect of salary from 1 to 11 November 2021; £2,166.66 as one month's notice pay; and £950 in respect of accrued but untaken leave being 13.5 days less 4 days taken. The gross total was stated as £4016.66. The letter stated that payment would be made subject to return of company property (documents and office keys).
27. A payslip for the claimant for the pay period end 30 November 2021 itemises the amounts stated on the letter of 24 November 2021 and records a net payment of £3,729.90.
28. Between 1 December 2021 and 4 December 2021, a number of payments were made from the claimant's bank account. The claimant said these totalled £367.52.
29. On Friday 3 December 2021, the claimant sent an email querying why her money was being withheld when it was due to be received on 1 December after receipt of her payslip.
30. On 4 December 2021, the respondent (Dr Frank) emailed and stated that he would not release the salary until property had been returned but that he was making a payment of £2000 as an interim payment as 'you appear to be experiencing financial difficulties'.
31. On 4 December 2021, the claimant received the sum of £2000 from the respondent into her bank account.
32. On 6 December 2021, the respondent communicated with the claimant to confirm he had received the property and stated that a payment of £1,717.15 had been made. A deduction of £12.75 had been made further to petty cash reconciliation. The claimant did not refer or raise objection to this deduction of £12.75 at the hearing.
33. On 6 December 2021, the claimant received the sum of £1,717.15 into her bank account.

Law

-Breach of contract

34. An employer is entitled to terminate an employee's employment without notice if the employee is in fundamental breach of contract. This will be the case if the employee commits an act of gross misconduct. If the employee was not in fundamental breach of contract, the contract can only lawfully be terminated by the giving of notice in accordance with the contract or, if the contract so provides, by a payment in lieu of notice.
35. A claim of breach of contract must be presented within 3 months beginning with the effective date of termination (subject to any extension because of the effect of early conciliation) unless it was not reasonably practicable to do so, in which case it must be submitted within what the Tribunal considers

to be a reasonable period thereafter.

36. Where a tribunal makes a declaration that there has been a breach of contract, an award of damages may be made to the claimant to put the claimant in the position they would have been in if the parties had performed their obligations according to the contract.

-Unauthorised deduction from wages

37. Section 13(1) of the Employment Rights Act 1996 provides that an employer shall not make a deduction from wages of a worker employed by him unless 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 the worker has previously signified in writing his agreement or consent to the making of the deduction. An employee has a right to complain to an Employment Tribunal of an unlawful deduction from wages pursuant to Section 23 of the Employment Rights Act 1996.

38. A claim about an unauthorised deduction from wages must be presented to an employment tribunal within 3 months beginning with the date of payment of the wages from which the deduction was made, with an extension for early conciliation if notification was made to ACAS within the primary time limit, unless it was not reasonably practicable to present it within that period and the Tribunal considers it was presented within a reasonable period after that.

39. Section 27(1) of the Employment Rights Act 1996 provides that 'wages' means 'any sums payable to the worker in connection with his employment' and sets out a non-exhaustive list of what is included. The list includes bonus. There must be some legal entitlement to the sum in question although this need not necessarily be a contractual entitlement. A discretionary bonus becomes a legal entitlement when it is declared and quantified, **Mouradian v Tradition Securities and Futures** [2009] EWCA Civ 60. An employment tribunal may construe a contract where necessary to decide if a sum is properly payable, **Agarwal v Cardiff University and anor** [2018] EWCA Civ 2084.

40. Whether a non-contractual bonus was payable where bonus payments within the firm were offered or made subject to targets being achieved was under consideration in **Farrell Matthews and Weir v Hansen** 2005 ICR 509, EAT. The EAT held that once an employer tells an employee that he is going to receive bonus payments on certain terms, he is, or ought to be obliged to pay that bonus in accordance with those terms until the terms are altered and notice of the alteration given. The EAT explained this applied equally where a discretion to award a bonus is granted under contract, by custom or by ad hoc decision.

41. A deduction from wages includes situations where there has been non-payment of sums properly payable. Where a Tribunal makes a declaration that there has been an unauthorised deduction from wages, it may order the employer to pay to the worker, in addition to the amount deducted, such amount as the Tribunal considers appropriate in all the circumstances to compensate the worker for any financial loss sustained by him which is attributable to the unlawful deduction.

42. Where there is a failure to comply with a relevant ACAS Code of Practice, the tribunal can adjust any award made up or down by up to 25%, section 207A Trade Union and Labour Relations (Consolidation) Act 1992.

Conclusions

-breach of contract (wrongful dismissal/notice pay)

43. There is no dispute that the claimant's contract of employment was terminated with immediate effect on 11 November 2021 in circumstances where the claimant was contractually entitled to a period of one month's notice or pay in lieu of notice. There is no dispute that the respondent provided pay in lieu of notice of one month as provided for in the contract. There is also no dispute that as at the date of the hearing notice pay has been paid in full. The respondent conceded at the hearing that payment made on 4 December 2021 was made late.
44. The respondent submitted that the tribunal should not entertain the claim for £367.52 as it had not previously been stated as claimed and it had not been particularised in the pleadings. The respondent's point has some merit as the amount claimed by way of remedy for breach of contract is not set out in the pleadings and nor do the pleadings contain particulars of this claim.
45. The claimant was not legally represented and had presented her claim initially due to the lack of clarity around the circumstances of termination. I have found that the respondent provided inaccurate correspondence to the claimant. The claimant's claim does include claims for breach of contract (wrongful dismissal), notice pay, arrears of pay, holiday pay and other payments. I took account of the overriding objective to deal with cases fairly and justly. The respondent is legally represented and had full sight, in advance of the hearing, of the documents which include provision of the claimant's bank statements and the respondent's email stating that due to awareness of financial difficulties monies would be released. I concluded the issue arises on the legal claims made and the factual context of those claims and the missing detail was the quantum of remedy sought. I concluded it was appropriate to consider the detail of the claimant's claim in respect of breach of contract and as to any potential remedy.
46. The initial position adopted by the respondent was somewhat different to the accepted contractual entitlement regarding termination before me at the hearing. The respondent's letter dated 11 November 2021 set out that the claimant's last working day was 11 November 2021 but did not explicitly refer to any period of notice or pay in lieu of notice stating rather that the claimant would be paid up to 30 November 2021 together with pay in lieu of accrued but untaken annual leave. The claimant raised a grievance focussed on querying the reason for the termination. The respondent replied inaccurately setting out that the claimant's entitlement was to one week's notice as she was on probation although payment was being made for two weeks. The claimant presented her claim to the employment tribunal.
47. On 24 November 2021, the respondent confirmed the amounts that would be paid and these aligned with the claimant's contractual entitlement. The respondent still however sought to withhold the sums which included wages

for the period worked between 1 and 11 November 2021, the pay in lieu of accrued but untaken annual leave and the pay in lieu of notice. Accordingly, the claimant did not receive any pay for work done or in lieu of notice when due on 1 December 2021. I conclude the respondent acted in breach of contract with regard to the termination of the contract in respect of notice pay.

48. The claimant says that she is entitled to damages for this breach of contract as the late payment resulted in financial loss. The claimant says that amounts paid out of her account between 1 and 4 December represent loss arising from the late payment.
49. The respondent paid the claimant the sum of £2000 on 4 December 2021 in part payment of the sums owed and paid the remainder on 6 December 2021. I note the amount received on 4 December 2021 is more than the claimant's ordinary net monthly wages. The reason given as to why the claimant suffered financial loss is that as there were no cleared funds in the claimant's account, the claimant's overdraft facility was used for the first time to make the payments. The difficulty for the claimant and this was explained at the hearing before the claimant confirmed what was claimed is that any loss suffered has to be shown as attributable to the breach of contract. The amounts paid from the claimant's bank account were amounts she was either liable to pay in any event or potentially payments she opted to make during that period. The amounts did not present as amounts arising in addition to any pre-existing liability such as interest or bank charges arising on a debit balance or use of an overdraft facility attributable to the late payment by the respondent.
50. I therefore concluded that the claimant had not been wrongfully dismissed as provided with the notice period under the terms of the contract with pay in lieu of notice. The respondent was in breach of contract by failing to pay the claimant notice pay when due although I concluded that the claimant was not entitled to any damages for financial loss due to the breach of contract.
51. The claimant's remedy is therefore restricted to a declaration to the effect that the respondent was in breach of contract and I make no award of damages.

-unauthorised deduction from wages

52. The claimant says that the respondent made an unauthorised deduction from her wages by failing to pay her a bonus in the amount of £4000 to which she was contractually entitled. The respondent has not paid the claimant any amount referable to a bonus but a non-payment is capable of being a deduction provided that the amount in question is properly payable as wages. The respondent said that the bonus was discretionary and as such did not fall within the concept of wages.
53. Section 27(1) of the Employment Rights Act 1996 provides that wages are sums properly payable in connection with employment and expressly includes a bonus as an item that can be considered as wages. The remuneration provision in the claimant's contract provides entitlement to a basic salary and that the claimant is 'also entitled' to a bonus in the amount

of £4000 gross subject to certain conditions. I conclude that the bonus is therefore to be considered wages, an amount payable in connection with employment and a component of her annual remuneration package.

54. The contractual provision qualifies the entitlement to the payment of £4000 on the basis that it is 'subject to you achieving targets that are mutually agreed upon'. The claimant has a legal entitlement arising from her contract of employment to a bonus. Whilst the bonus is not stated to be at the employer's discretion, it is on terms. I conclude that the claimant had a contractual entitlement to an annual bonus of £4000 in circumstances where she met the term of achieving targets that had been mutually agreed.
55. In evidence, the claimant described the wording as 'open'. The provision is silent as to what constitutes targets, any mechanism to agree targets other than that they must be mutually agreed and as to how and when the bonus is to be paid. This is in contrast to the provision for basic salary to be paid in monthly instalments and I find indicative of an intention that the bonus was due to be paid as a one off lump sum.
56. The claimant gave evidence that she considered that the tasks she was set and completed every day were targets and in the absence of any indication that she was not performing, she considered she was entitled to the bonus. In addition, the claimant's starting point at interview was that she wished for a salary of £30,000 and that resulted in the bonus provision in addition to the basic salary. The claimant entered into employment with the expectation that with her work ethic she would secure the bonus. Dr Frank gave evidence that a target might have been a plan to implement efficiencies and the results of that plan rather than tasks which were part of the day to day job. I conclude that whilst the provision may have been to accommodate the claimant's wish for a salary higher than £26,000, the allocation of amounts coupled with the qualifying term is indicative of the bonus being for something more than the ordinary day to day tasks within the job role of office administrator. The respondent could not provide a basic salary of £30,000 as that was not within budget but was prepared to provide additional remuneration if the claimant delivered something of benefit to the business.
57. There was limited evidence before me as to the claimant's day to day tasks. There was also a tension in the evidence the claimant presented. Although the claimant said that targets must have been achieved on the basis that she completed the daily tasks set for her save where they were allocated to others or pending approval, the claimant also accepted that at no point were targets discussed or set. This was consistent with Dr Frank's evidence that targets were neither discussed nor set. Due to the consistent evidence, I conclude that no targets were discussed or set.
58. The provision requires mutually agreed targets. I reflected that this renders the provision inherently problematic as it could be thwarted by either party refusing to agree targets even were they to be discussed. A refusal to agree targets would be more likely to the respondent's benefit as employer as it would prevent payment. In these circumstances, I gave careful consideration to the evidence that targets were not discussed or set.
59. I was mindful that the remuneration provision was the result of the claimant's

negotiation whereby her starting point was a desire for a basic salary of £30,000 and reasonably infer that she has some ability to articulate her needs and concerns within the particular workplace. I do accept the ordinary imbalance of bargaining power as between employer/employee in the formation of a contract. I also accept the claimant's evidence that to the extent she did not complete tasks this was in part due to awaiting approval from Dr Frank who was working remotely, located in Italy and at times difficult to get hold of.

60. The claimant submitted that Dr Frank's evidence in his written statement that there was not time to address agreeing targets was not a good enough reason. I am mindful that the claimant indicated in her particulars of claim that targets would be set to be achieved after probation. Therefore, whilst targets were anticipated by the claimant to be set at the beginning, the real need to be working towards targets in order to achieve the bonus would not begin until after her probationary period ended.
61. I have some considerable sympathy for the claimant in the circumstances. I have no doubt the claimant is a committed, conscientious and hard working person. The claimant appeared as a litigant in person before the tribunal and conducted herself admirably. The claimant outlined that in her eyes she was meeting the tasks set on a day to day basis and thus given there was no indication that her performance was problematic she assumed she would in due course receive the bonus. However, for the reasons stated above that targets present as something more than the everyday tasks of the role and were to be discussed and agreed and in addition that as a matter of meaning the word 'target' itself suggests something to be aimed for and met in the future rather than on a day to day ongoing basis, I conclude that satisfactory completion of everyday tasks was not sufficient.
62. There was limited evidence before me as to whether or not the claimant did satisfactorily complete her ordinary work tasks in any event. The respondent says there were concerns but these are not evident on the evidence before me and have therefore not given rise to any findings to that effect. On the other hand, the evidence did not securely enable me to find that the claimant was meeting the ordinary requirements of the role. The impression presented by the claimant was, as I state above, of a hardworking person and moreover one surprised by how matters turned out but on the evidence, I cannot reach a finding about ordinary performance. For the reasons given, such a finding is not in my view necessary as I consider 'targets' to mean something more.
63. Again, I have some sympathy with the claimant's view that time should have been found and discussion could have been remote and did not need to be in person. The claimant's acceptance that working towards targets would be after probation puts the timeframe into at least early September setting aside any consideration as to the extension of probation. There was no evidence before me to suggest that discussion was being consciously avoided with any particular intent. I may have reached a different conclusion if the claimant had remained employed for a complete year during which the respondent had not expressly reviewed performance or discussed and set targets with the claimant where the claimant had taken steps to address this. The wording refers to mutually agreeing targets and it is clear that at no point did the claimant initiate discussion on targets and there is no

evidence to that effect. The claimant also accepted in evidence none were set and therefore clearly none were achieved. Accordingly, there were no mutually agreed targets achieved triggering entitlement to the bonus at any point during the period of employment.

64. I have therefore concluded that the respondent did not make an unauthorised deduction from the claimant's wages by not paying her any bonus and the claim for unauthorised deduction from wages fails.

Employment Judge - Peer

16 May 2022
Date

JUDGMENT & REASONS SENT TO THE PARTIES ON

16/05/2022..

FOR THE TRIBUNAL OFFICE