EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Ms Maria Alvarez-Garcia	**v**	**Ellis Miller London Limited**

Heard at: Watford **On**: 8 December 2020

Before: Employment Judge Bloch QC (sitting alone)

Appearances

For the Claimant: In person
For the Respondent: Mr Gunnion, Solicitor

COVID-19 Statement on behalf of Sir Keith Lindblom, Senior President of Tribunals

This has been a remote hearing which has not been objected to by the parties. The form of remote hearing was by video (CVP). A face to face hearing was not held because it was not practicable and no-one requested the same and all issues could be determined in a remote hearing.

JUDGMENT

1. The claimant's claim of an unauthorised deduction from her wages pursuant to s.23 of the Employment Rights Act 1996 is upheld and the respondent is ordered to pay to the claimant the sum of £3,463.85 (net) as an unlawful deduction.

2. For the avoidance of doubt that sum is additional to the judgment in favour of the claimant against the respondent given on 12 November 2020 in the amount of £1,676.62.

REASONS

1. The claimant was employed by the respondent under a written contract of employment dated 3 September 2018. She was employed as a Part 2 Architectural Assistant at a gross salary of £2,000 per month giving her a take home pay of £1,642 per month.

2. She was employed for a relatively short period, her contract being terminated by giving to her, her contractual one months' notice on 1 April 2019 so that her last date of employment was 30 April 2019.

3. In May 2019 there was correspondence between the Citizen's Advice Bureau solicitor acting for the claimant and the respondent and by his letter of 30 May 2019 Mr Jonathan Ellis-Miller, the Director and sole shareholder of the respondent, appeared to accept that the sums claimed by the claimant in respect of arrears of pay, holiday pay and notice pay would be paid in due course. Thereafter however, Mr Ellis-Miller appeared to contest certain of those figures. The claimant filed her claim form on 23 July 2019.

4. When the matter came before me in a video hearing (CVP) on 12 November 2020, the respondent accepted that it was indebted to the claimant in the sum of £1,676.62 (comprising a sum of £1,642.04 in respect of salary and £34.58 in respect of expenses). I gave judgment for that sum but to my surprise on enquiry this morning it appeared that admitted sum had not yet been paid to the claimant. It is right that the written judgment only reached the respondent's yesterday but, given that the sum was an admitted sum, it is surprising that the respondent did not immediately pay that sum to the claimant who has been out of pocket since May 2019.

5. With great reluctance on the last occasion I granted a postponement of the hearing until today on grounds of Mr Ellis-Miller apparently not being well enough to attend that hearing. That was the third postponement granted at the request of the respondent.

6. It appeared that Mr Ellis-Miller was again said to be not well enough to attend this video hearing and he submitted a two page witness statement I was told my Mr Gunnion, who appeared on his behalf, that the respondent was content for Mr Gunnion to proceed on its behalf.

7. The claimant submitted an unsigned witness statement which she confirmed in evidence was true to the best of her knowledge and belief. She set out her claim comprising:

    7.1 Arrears of pay: £3,544.87

    7.2 One months' notice pay entitlement: £1,642.04; and

    7.3 Four days' holiday pay: £218.93

    The total was £5,405.84

8. After deduction from the sum of £5,405.84 of the amount of the judgment in the sum of £1,676,62, the balance of the claim for the purposes of today was £3,729.22.

9. Mr Gunnion cross-examined the claimant on the fine detail of the calculation of holiday pay and unpaid leave as well as sums which had been paid by the respondent by way of pension under the auto-enrolment procedures.

10. Surprisingly, these points had not been put to the claimant who had as long ago as May 2019 set out the precise sums which she claimed. Be that as it may, as a result of cross examination certain sums were agreed to be deducted from the sum of £3,729.22. These agreed deductions were:

    10.1 £148.01 in respect of pension payments made on behalf of the claimant; and

    10.2 a sum of £277.38 in respect of unpaid leave/holiday pay.

11. On that basis the sum was reduced from £3,729.22 to £3,303.83.

12. The parties agreed that the claimant was entitled for the 2019 holiday year to an additional sum of £160.02 (being the sum of £378.95 less £218.93). The total amount in issue is accordingly £3463.85, being the sum of £3303.83 plus £160.02 in respect of holiday pay.

13. There remained two key issues for me to decide. The first related to whether the respondent was entitled to a deduction from the claimant's claim of 3 days holiday which it is alleged the claimant took between 17 and 20 December 2018. The second and more material point was whether the claimant was laid-off from her employment in which case the respondent maintained that she was entitled to only £667.48 in respect of the month of May. That comprised:

    13.1 Five days which she worked (for which she was entitled on any basis to be paid);

    13.2 Two Bank Holidays during that month; and

    13.3 Five days of statutory guaranteed pay pursuant to sections 87 and 88 of the Employment Rights Act 1996.

    Against that the claimant claimed the full one month notice pay entitlement in the amount of £1,642.04.

14. Turing to the first issue, the claimant gave evidence (at paragraph 7) that Mr Jonathan Ellis-Miller said that it was agreed that the claimant would have unpaid leave from 18 December 2018. He requested his accountant to calculate what was owing to the claimant and at page 51 of the bundle the accountant referred to the holiday as starting on 18 December 2018. Against that, the claimant referred to an email by Mr Ellis-Miller to her (bundle page 58) dated 5 April 2019, in which he referred to her holiday as commencing on 20 December.

15. In deciding this issue, I must weigh up the evidence of the claimant who gave "live" evidence before me and that of Mr Ellis-Miller who submitted a written statement and was not subjected to cross-examination, as was the claimant. My firm impression of the claimant as a witness was that she was doing her best to tell the truth and to be as accurate as possible. I have no reason whatever to doubt her when she says she began her holiday on 20 December 2018. She was supported in this by the email which she refers to by Mr Jonathan Ellis-Miller dated 5 April 2019. Accordingly, I find in the claimant's favour on this issue.

16. The second issue is rather more complicated. There appeared in the bundle a statement of particulars of employment which was said, together with the offer letter and the employee handbook, to form the claimant's written contract of employment. The contract referred to a notice period (the relevant time) of one month on either side to terminate the employment. The contract further provided that the claimant was not to engage in any other profession, trade or business during her employment without the company's prior written consent. That permission would not be unreasonably withheld. She was to devote the whole of her time, attention and abilities during hours of work for the company, to her duties for the company.

17. At page 38 of the bundle there appeared the following clause:

> "The Company reserves the right, at its sole discretion, not to offer you any work during the whole, or any part, of the notice period, and to require you not to attend work during this time. You, whether or not provided with work will, continue to receive your normal salary and any contractual bonuses to which you are entitled during the notice period. You are not permitted to undertake any other form of employment, whether paid or unpaid, during the notice period, without the Company's prior written permission."

18. That clause was relied upon by the claimant.

19. The respondent relied upon a clause (bundle page 40) headed "Short-Time Working and Lay Offs:

> "The Company reserves the right to introduce short-time working or a period of temporary lay-off without pay (with the exception of any statutory entitlement) where this is necessary to avoid redundancies or where there is a shortage of work."

20. By email dated 1 April 2019 by Mr Ellis-Miller to the claimant he said:

> "Further to our conversation this morning I have to give you notice that I am going to have to terminate your contract of employment as of today. As I explained we have had a number of projects cancelled and there is simply no work for you to do. The notice period is per your contract of employment, however if you find alternative employment in the meantime you are free to take that offer and not to work out your notice…...

21. By an email dated 8 April 2019 (09:28) Mr Ellis-Miller stated to the claimant:

> "I understand that Sruly has no work. Thus you are laid off under the terms of the contract with no pay as of 9.30am today."

22. Ms Alvarez contends that this "lay off" was not a temporary lay off without pay as covered by the Lay Off Clause. She says that the lay off was permanent in the sense of applying during the rest of her employment. She also questions whether the respondent has proved that the "lay-off" was necessary to avoid redundancies or where there was a shortage of work. She instead relies upon the provision in which the Company reserved the right at its sole discretion not to offer the claimant any work during the whole or any part of the notice period. That stated that whether or not provide with work, the claimant would continue to receive her normal salary.

23. I do not find this point entirely straightforward but in my judgment on balance, I conclude that Ms Alvarez is right in her reading and understanding of the contract. I conclude this for the following reasons:

    23.1 It does seem to be an unusual and unenvisaged use of the lay off right to seek to apply it against an employee who is already under notice and told not to work. I tend to agree with Ms Alvarez that given that the contract (in this case had only less than a month to run) it does not seem correct to refer to the "lay off" in this case as being temporary. It was as permanent as a lay off could be, within a contract which was about to end.

    23.2 Moreover, the provision upon which the claimant arises applies specifically to the position between the parties during the notice period whereas the lay off clause does not. The garden leave type clause on which the claimant relies provides (in the usual way) that the claimant will receive her normal salary during that period. It seems to me that this being a more specific provision, in accordance with usual contractual modes of interpretation it supersedes or overrides the more general provision for lay off under the Lay Off Clause. That seems all the more to be the case where the right to put the employee on garden leave has been implemented.

    23.3 In my judgment, it was not, on the proper construction of this contract envisaged by the parties (I refer to an objective assessment of their intentions) that having given notice to terminate the contract of employment the respondent would then use the Lay Off Clause to avoid paying contractual notice pay.

    23.4 Accordingly, I resolve that issue in favour of the claimant.

24. I accordingly gave judgment to the claimant in the amount of £3,303.83.

_____
Employment Judge Bloch QC

Date: …23 February 2021……..

Sent to the parties on: .....

.....
For the Tribunal Office