EMPLOYMENT TRIBUNALS

Claimant: Miss E Alboukharey

Respondent: Tools and Knobs Ltd

Heard at: London Central **On:** 25 March 2019

Before: Employment Judge H Grewal

Representation

Claimant: In person

Respondent: Mr T Gillie, Counsel

JUDGMENT

1 The complaint of wrongful dismissal/breach of contract is well-founded and the Respondent is to pay the Claimant damages in the sum of £1,890.

2 The claim for accrued holiday pay under regulation 14 of the Working Time Regulations 1998 is well-founded and the Respondent is to pay the Claimant £665.74 (gross).

3 The complaint of unauthorised deductions from wages is well-founded and the Respondent is to pay the Claimant £230.76 gross.

REASONS

1 In a claim form presented on 1 December 2019 the Claimant complained of wrongful dismissal (breach of contract), unauthorised deductions from wages and failure to pay accrued holiday pay.

The Evidence

2 The Claimant, Alexandra Mead and Karl Watson gave evidence on behalf of the Claimant. Simon Lo Gatto, Rebecca Munn and Agnieszka Wozniak gave evidence on behalf of the Respondent. There was also a small bundle of documents before me. Having considered all the oral and documentary evidence, I made the following findings of fact.

Findings of fact

3 Matrix Office Interiors Ltd ("MOI") was a private limited company that provided wholesale furniture, carpets and lighting equipment to offices. It outsourced any design and construction work to external contractors. Layal Hamdan was the sole shareholder and director of the company, but she played no part in the running of the company. It was effectively run and managed by her husband Simon Lo Gatto, who was employed as Head of Sales.

4 In June 2016 Karl Watson, who worked for another office design company, approached Mr Lo Gatto with a joint venture proposal. The proposal was that MOI would continue doing what it did but that they would set up a separate company which would provide office design and furniture installation for commercial premises. The two companies would work together and share resources. The new company would be able to bid for full-scale office refurbishment/development projects which MOI could not do on its own. The proposal was accepted by Mr Lo Gatto.

5 The Respondent was incorporated on 3 July 2016. At that time it was called Matrix Office Interior and Construction Solutions Ltd ("MOICS"). Layal Hamdan and Karl Watson each held 50% of the shares in MOICS and were its directors. Ms Hamdan was the company secretary. The Respondent recruited six employees, and they and Mr Watson worked from MOI's showroom and used computers provided by MOI. The Respondent did not have its own bank account and the employees' salaries were paid from the MOI account by Mr Lo Gatto. Mr Lo Gatto was not a shareholder, officer or employee of the Respondent but he worked closely with Mr Watson on projects in which both companies were involved.

6 The Claimant commenced employment with the Respondent on 16 July 2018 as an Interior Designer. The Claimant's contract of employment with the Respondent (referred to as "the Company" in the contract) contained the following clauses:

> "*HOURS OF WORK*
>
> *Your normal hours of work will be Monday to Friday 9 am to 5.30 pm with one hour for lunch. You may be required to work outside these hours as necessary for the proper performance of your duties. Lunch breaks and other breaks provided to you will not constitute working time."*

"*REMUNERATION*

Your salary is £30,000 per annum.

Your salary will be paid into your bank account by BACS payment on the 25th of each month…

The Company is entitled to deduct from your salary or any other payment due to you from the Company, including any payment due to you on termination of employment, any sums properly due to you from the Company. Such sums include, without limitation, … repayment of any overpaid holiday pay, salary or benefits …"

"HOLIDAY ENTITLEMENT

The Company's holiday year runs from 1st January to 31st December each year.

You are entitled to 22 working days' holidays per year in addition to public holidays …

On leaving the Company, you will be entitled to holiday pay in respect of any accrued holiday entitlement, which you have not taken."

"TERMINATION OF EMPLOYMENT

…

You will be entitled to one month's notice in writing from the Company for the termination of your employment."

"TERMINATION OF EMPLOYMENT IN THE EVENT OF AN ACT OF GROSS MISCONDUCT

Nothing in the contract of employment shall prevent the Company terminating your employment without notice or payment in lieu of notice in the event of an act of gross misconduct likely to have a material effect on the Company. Such conduct by a Director or Employee would include but is not limited to the following:

…

(ii) Use of confidential information or use of the Company's property for purposes other than the Company's Business."

CONFIDENTIALITY

*You must not at any time during your employment (except so far as may be necessary for the proper performance of your duties) or after the termination of your employment use for any purpose other than the Company's business or disclose to any person or body any Confidential Information obtained during your employment. For the purpose of this clause "**Confidential information"** means any information of a confidential nature relating to the Company and/or their respective clients, customers, suppliers, and/or any business finances,*

transactions, affairs, charging structures or future plans which belong to and are of value to the Company and/or in respect of which the Company owes an obligation of confidence to any third party. Such information includes, but is not limited to:

(a) Particulars of any clients and potential clients of the Company; and

(b) Any financial information relating to, or business plans of, the Company."

7 At the end of July the Claimant was paid a full month's salary although she had only worked part of the month. There was no evidence before me that that was done in error or that the Respondent was unaware of it until after the Claimant's departure. The Claimant reported to Mr Watson and he managed her work on a day to day basis. In the course of her employment the Claimant sometimes worked from home. She often copied work files on to her UBS stick. Mr Watson was aware of that and had no objection to it. He was also aware that designers often used designs on which they had worked to build a portfolio of their work and he had no objection to the Claimant doing that.

8 By October 2018 the relationship between Ms Hamdan and Mr Lo Gatto, on the one hand, and Mr Watson, on the other, had broken down. On 25 October the parties agreed that they would part ways and Mr Watson was not permitted to enter the showroom after that date. They agreed that all leads generated by MOI would be run through them and all leads generated by the Respondent would be run through them.

9 On 26 October Mr Lo Gatto told the Respondent's employees that he would conduct an internal review of the services that MOI would be providing after the split and that that could potentially result in MOI offering contracts of employment to some or all of the Respondent's employees. He sent Mr Watson an email that neither the clients of the two companies nor the Respondent's employees should be contacted until the review had been concluded.

10 On 31 October Ms Hamadan resigned as director of the Respondent. On 2 November she transferred her shareholding to someone called Antonio Rubel. It appears that he might have been related to Mr Lo Gatto.

11 Having carried out his review Mr Lo Gatto decided that MOI would offer employment to four of the Respondent's employees. The Claimant and another employee called Alexandra Mead would not be offered employment by MOI.

12 On 2 November at about 4 p.m. Mr Lo Gatto called the Claimant into the meeting room in the showroom. He told her that he could not offer her a contract of employment. The Claimant was very upset and emotional. She claimed that he had dismissed her boss, Mr Watson, and was treating her unfairly because she had been close to Mr Watson and that he had never liked her or treated her well. She said that she had been thinking of resigning. She said that if he wanted her to leave, he would have to pay her four weeks' notice pay. Mr Lo Gatto said that she should raise that with Karl Watson because he was her boss. The Claimant said that she could not raise it with him because Mr Lo Gatto had already dismissed him. She pointed out that his wife's name was on her contract and Mr Lo Gatto told her that she had resigned as a director. After a brief heated exchange, Mr Lo Gatto told her that the meeting was over and there was nothing else to say.

13 Mr Lo Gatto then escorted the Claimant into the showroom and asked her to collect all her personal belongings and to leave. He told her not to touch the computer. The Claimant hurriedly packed her belongings and left. Mr Lo Gatto then had a meeting with Ms Mead to convey the same information to her.

14 After she had left the Claimant realised that she had forgotten her scarf and her USB memory stick that was plugged into her computer. She asked Ms Mead, who was still in the office, to retrieve them for her. Mr Lo Gatto permitted her to take the scarf but he retained the USB stick. He said that it would need to be checked to make sure that it did not contain any information belonging to MOI before it could be returned to the Claimant. He gave the memory stick to Rebecca Munn, one of the Respondent's employees to whom Mr Lo Gatto had offered a contract, to examine. Ms Munn found that it contained a folder called "Matrix OICS". The folder held 3,812 items including drawings, specifications/quotations relating to clients and client details. The files related to the work that the Claimant had done for the Respondent. Ms Munn transferred the folders to her computer and deleted it from the memory stick. By this stage the Claimant had returned the to the showroom and was threatening to call the police. Mr Lo Gatto had locked the door, but once the folder had been copied and deleted from the Claimant's memory stick, he opened the door and returned the memory stick to her.

15 It was clear to the Claimant that the Respondent was not going to continue operating from the showroom and that the Claimant was not going to be permitted to return to work there. She had been removed form the workplace and no-one from the Respondent gave her any information about how or where she could continue her employment.

16 Later that evening Mr Watson sent Mr Lo Gatto an email with documents showing that he was resigning as director and transferring his shares to Ms Hamadan. He said that the company was now hers and pointed out that he had had no dealings with the company since 25 October 2018. He also said that all the clients had been sent a letter saying that the Respondent's quotes were void and advising them of the Respondent's status. It was clear from his email that the Respondent would not be doing any more business.

17 On 4 November 2018 the Claimant sent Mr Lo Gatto an email and asked about what payments would be made to her after the redundancy notice that he had issued. Mr Lo Gatto responded that his IT company had informed him that either the Claimant or someone using her password had deleted several thousand files from her account on the morning of 2 November. He said that any queries that she had about any pay should be addressed to Mr Watson.

18 Shortly after the Claimant's employment terminated she was approached by an ex-colleague who worked for a competitor. He asked her about two of the clients whom the Respondent had approached and asked her to provide him with any files that she had. He offered to pay her £2,000 for each one. The Claimant was initially reluctant to do so, but she eventually sent him two or three files.

19 On 13 November 2018 the Respondent's name was changed to Tools and Knobs Ltd. Mr Watson resigned as a Director either on 25 October 2018 or on 22 December 2018. Mr Lo Gatto was appointed Director on 8 January 2019. Mr Lo Gatto claims

that that was done without his consent or knowledge and has applied to Companies House for it to be rectified.

Conclusions

20 I concluded that the Claimant's contract of employment was terminated on 2 November 2019 when she elected to treat herself as dismissed as a result of the Respondent's repudiatory breach (or anticipated repudiatory breach). By that date it had been made clear to the Claimant that the Respondent was not going to provide her with any work and that she could not work from the premises where she had worked before. She was not told of any other premises form which she could work. She was essentially excluded from the office and not told to report to work anywhere else. It was clear from that conduct that the Respondent no longer intended to be bound by the contract of employment. The Claimant accepted that repudiation by leaving work and not returning to it.

21 I am not saying that the Claimant was dismissed by Mr Lo Gatto. He was not an an officer or an employee of the Respondent and he had no authority to dismiss the Claimant. There was no evidence that either Mr Watson or Ms Hamadan had given him that authority. I have found that the conduct of the Respondent (Mr Watson and Ms Hamadan) between 25 October 2018 and 2 November 2018 amounted to a repudiatory breach. Neither of them had any contact with the Respondent's employees during that period and did nothing to assure them that their employment would continue. On the contrary, it was clear to everyone that if they were not engaged by MOI there would be no work available for them. That was confirmed when Mr Lo Gatto excluded them from the workplace on 2 November 2018 and they were not informed of any other premises which they should attend for work.

22 I do not accept that there was any repudiatory breach by the Claimant before that date which would have justified the Respondent dismissing her summarily. It is correct that the Claimant had some work files on her UBS stick. Her boss Mr Watson was aware of that and had not raised any objections about it. I, therefore, accepted that the claim for wrongful dismissal is made out and the Claimant is entitled to damages for that. The Claimant's net monthly pay was £1,890 and I award her that sum for the wrongful dismissal.

23 It is not in dispute that the Claimant was entitled to be paid for 1 and 2 November and that she was entitled to be paid for annual leave that she had accrued but not taken. There was a dispute as to how those amounts were to be calculated and whether the Respondent had not paid those sums because it had exercised its discretion under the Claimant's contract to deduct from those sums the overpayment of salary in July 2016. I accept that under the Claimant's contract the Respondent could have deducted any overpayment that it had made to her from any payment due to her on termination of her employment. The issue for me was whether it did so and whether that was the reason for not paying her her wages for 1 and 2 November and her accrued holiday pay. There was no evidence before me that the Respondent regarded the payment in July to be an overpayment and that it had decided to deduct that amount from the payments due to her. The Respondent had not pleaded any such defence in its Response. No one from the Respondent who had authority to make decisions in November 2018 gave evidence to that effect. In the absence of that deduction having been made, the Claimant was entitled to be paid the sums due

to her. Failure to do so, without any explanation for the non-payment, amounts to an unauthorised deduction from her wages.

24 The Claimant's holiday entitlement was 22 working days plus bank holidays. Between 16 July and 2 November she worked 16 weeks. That equates to 30.76% of the holiday year. 30.76% x 22 = 6.77 days. There was one bank holiday during that period. The Claimant had, therefore, accrued 7.77 days' holiday. She took two days' holiday. She is, therefore, entitled to be paid 5.77 days' holiday. The Respondent accepts that the daily rate for that is calculated by dividing the Claimant's annual salary (£30,000) by 260. That comes to £115.38 which multiplied by 5.77 gives £665.74.

25 The Respondent argued that as a result of the Supreme Court decision in **Hartley and others v King Edward VI College [2017] UKSC 39** in calculating what the Claimant is to be paid for working two days in November, the correct approach it to regard her as having accrued 1/365 of her annual salary daily. That case concerned the employment contracts of teachers. The Supreme Court held that the Apportionment Act 1870 applies to employment contracts. Section 2 of the 1870 Act provides,

> "*All rents, annuities, dividends, and other periodical payments in the nature of income (whether reserved or made payable under an instrument in writing or otherwise) shall, like interest on money lent, be considered as accruing from day to day, and shall be apportionable in respect of time accordingly."*

"Annuities" includes salaries and pensions. Section 7 of the 1870 Act provides,

> "T*he provisions of this Act shall not extend to any case in which it is or shall be expressly stipulated that no apportionment shall take place."*

In **Hartley** Lord Clarke stated, at paragraph 34,

> "*In all these circumstances, the cases seem to me to show that the correct approach under section 2 to a case like this, where the contract is an annual contract, is to hold that the salary must be apportioned on a calendar day basis over 365 days, which yields a daily figure of 1/365."*

It had been argued that the correct figure to adopt was 1/260. In respect of that Lord Clarke stated,

> "*As I see it, the difficulty with 1/260 is that, given the work done by the teachers described above was not limited to work during week days, it makes no sense to choose a calculation of 1/260 of the annual salary, which assumes only week day working. I would, therefore, reject the 1/260 figure."*

He said, at paragraph 41,

> "*As I see it, the amount of daily rate provided for in section 2 which is to be "apportioned in respect of time accordingly" will depend upon the terms of the contract. I agree with Elias LJ … that absent a provision (I would say an express provision) to the contrary the principle of equal daily accrual will be the obvious principle to adopt. For the reasons given above, I am of the opinion that 1/365 is*

the appropriate rate here. In any case the precise figure will depend on the true construction of the contract."

26 In the present case, the Claimant's contract provided that her normal working hours were from 9 am to 5.30 pm (with one hour lunch break which was not working time) from Monday to Friday. That to my mind is an express stipulation that those are the hours for which she will be paid her remuneration, i.e. she will be paid for £30,000 per annum for working only on week days - 260 days a year. There was no evidence before me that she was regularly required to, or that she in fact did work, evenings and weekends. In those circumstances, the appropriate daily rate, in my view, is 1/260. That is £115.38.

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Employment Judge Grewal

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Date 15 May 2019

JUDGMENT & REASONS SENT TO THE PARTIES ON

17 May 2019

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FOR THE TRIBUNAL OFFICE