EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr F Domingues	**v**	**Perfect Five Studio Ltd**

Heard at: London Central (by video) **On**: 26 October 2020

Before: Employment Judge P Klimov

Representation

For the Claimant: in person

For the Respondent: Mr. J. Cook (of Counsel)

This has been a remote hearing which was not objected to by the parties. The form of remote hearing was by Cloud Video Platform (CVP). A face to face hearing was not held because it was not practicable due to the Coronavirus pandemic restrictions and all issues could be determined in a remote hearing

RESERVED JUDGMENT

It is the judgment of this tribunal that:

1. The respondent has made an unlawful deduction from the claimant's wages in contravention of section 13 of the Employment Rights Act 1996 and is ordered to pay the claimant the gross sum of **£461.54** and to account to HRMC for any tax and NI due,

2. The respondent was in breach of contract by dismissing the claimant without notice and is ordered to pay the claimant the sum of **£3,692.32**, being damages for breach of contract.

REASONS

Introduction

1. This case was heard by the tribunal on 26 October 2020 together with the related case No.2201503/2020 Ms. E. Gunay v. Perfect Five Studio Ltd ("**related proceedings**").

2. The claimant claims that the respondent made an unlawful deduction from his wages and breached his contract of employment by failing to pay his salary for the period between 21-28 January 2020 and by dismissing him without giving him the required contractual eight weeks' notice. The respondent contests the claims.

3. The claimant represented himself and gave sworn evidence and was cross-examined by Mr. Cook, counsel, who represented the respondent. Mr. Cook called sworn evidence from Ms. Leila Moghadam, a director of the respondent.

4. Ms. Moghadam had initially been named as a respondent in these proceedings and in the related proceedings, however, by the tribunal's decision of 25 August 2020 she was substituted by the current respondent in both cases.

5. I was referred to various documents included in the bundle of documents of 101 pages, which the parties introduced in evidence. The claimant also referred me to some other documents he had sent to the tribunal, which were not included in the hearing bundle. The respondent did not object to the tribunal considering those additional documents. At the end of the hearing the parties made their submissions.

Preliminary issues

6. At the beginning of the hearing I had to deal with two preliminary issues.

Respondent's application under Rule 20

7. The respondent failed to present a response to the claim in these and the related proceedings in time, as required by Rule 16 of the Employment Tribunal Rules of Procedure.

8. On 22 October 2020 the respondent's solicitors applied for permission to serve the response out of time and to adjourn the final hearing. They also sought to remove Ms. Moghadam as a respondent, but that was no longer a live issue.

9. The respondent sought the extension of time for presenting a response on the ground that it was not aware of the claims. Since becoming aware of the claims the respondent acted promptly in making the application, however, as it had not received the ET1 it had not been able to submit its draft response with the application.

10. On Friday, 23 October 2020, the respondent's solicitors sent to the tribunal draft grounds of resistance in both cases, but without completed ET3

forms. The respondent's solicitors confirmed that the respondent had received the claimant's ET1 on 22 October 2020.

11. At the hearing Mr. Cook pursued the respondent's application under Rule 20 for the tribunal to grant an extension of time and to allow the responses submitted on 23 October 2020. In support of the application Mr. Cook called witness evidence of Ms. Moghadam, who gave evidence that she had only received the claim forms on 22 October 2020 when these had been sent to the tribunal by email copying her. Her evidence was that the respondent's lease at the address, to which the claim forms had been sent, had expired in January 2020 and a forwarding address had not been arranged as most correspondence had been done by email. She said that the last time she had visited that address was in late June, and at that time was told by the security guard that there was no post for the respondent.

12. Her evidence were not challenged by the claimant.

13. In his submissions Mr. Cook argued that I should exercise my discretion and allow the respondent's late responses as this would be in accordance with the overriding objective under Rule 2.

14. He referred me to the case: *Kwik Save Stores Ltd v Swain and ors 1997 ICR 49, EAT*, which sets out the relevant legal test I should apply in deciding on the application. Mr. Cook drew to my attention the three factors that I should consider in deciding on the application. These are:

    (i) The respondent's explanation as to why an extension of time is required,

    (ii) the balance of prejudice, and

    (iii) the merits of the defence.

15. Mr. Cook submitted that:

    (i) the respondent had provided a reasonable and honest explanation for the delay in responding to the claims. He referred me to Ms. Moghadam's unchallenged evidence in that regard.

    (ii) if the application were refused the respondent would suffer a far greater prejudice than the claimants, as it would be prevented for defending the claims, and

    (iii) the respondent's case clearly had merits, and when deciding on the application the tribunal should not conduct a mini-trial on the merits, but simply satisfy itself that the defence had some merits, in which case this should be enough to favour granting an extension. He referred me to the respondent's draft grounds of resistance in support of his contention.

16. Mr. Cooked also submitted that if I was not prepared to exercise my discretion under Rule 20 in favour of the respondent and to allow the late responses, I should exercise my discretion under Rule 21(3) and allow the respondent to participate in the hearing.

17. I asked the claimant if he was opposing the respondent's application. He said that he was not.

18. I was satisfied that the respondent had met the Kwik Save Store three factors test, however, as the respondent had only presented draft grounds of resistance, and not completed draft ET3 forms, I asked Mr. Cook whether it was his case that I had the necessary power under Rule 20 to allow the respondent's responses in that form, despite Rule 17 requiring the tribunal to reject a response if it was presented not on a prescribed form.

19. Mr. Cook said that he believed there was an authority on that point and asked for a short adjournment to allow him to find it and address me on that issue. The hearing was adjourned for 15 minutes.

20. After the adjournment Mr. Cook said that he could not to find a direct authority on that point, but submitted that in deciding the application for an extension of time I should only consider Rule 20, which requires that the application "*be accompanied by a draft of the response which the respondent wishes to present*", and, unlike Rule 16, does not say that the draft response shall be on a prescribed form. He argued that if there was such a requirement for a draft response submitted under Rule 20, Rule 20 would have said so.

21. Mr. Cook also submitted that if the hearing on the merits were to be postponed, the tribunal could make an order for ET3 to be presented by the respondent.

22. I rejected Mr. Cook's interpretation of Rule 20. I decided that Rule 20 did not give me the discretion to allow the respondent's grounds of resistance to be treated as "a draft response" under Rule 20, as it was not submitted on a prescribed form. The respondent failed to submit completed ET3 forms together with the grounds of resistance, and Rule 17 required me to reject the respondent's response for that reason, and therefore there was no "draft response" submitted by the respondents for the purposes of Rule 20.

23. While I am cognisant of the requirement in Rule 2 that the tribunal should avoid unnecessary formality and should seek flexibility in the proceedings, I do not consider that Rule 16 has no application if a response is submitted out of time. To hold otherwise would mean that a response submitted in time, but rejected under Rule 17 for not being submitted on a prescribed form, could be later re-submitted out of time, together with an application for an extension of time, with the same defects as caused it to had been rejected in the first place, but this time in deciding on whether to allow a

defective response to be presented out of time the tribunal must disregard those defects. This cannot be right.

24. Mr. Cook's interpretation is also difficult to reconcile with Rule 19, which allows a respondent, whose response has been rejected under Rule 17 to apply for a reconsideration on the basis that the notified defect can be rectified. Rule 19(2) requires the respondent to rectify the defect, and Rule 19(4) says that if the judge decides that the original rejection was correct but that the defect has been rectified, the response shall be treated as presented on the date that the defect was rectified. I see no logical reason why the same rules should not apply to a defective response submitted out of time.

25. Therefore, I rejected the respondent's application under Rule 20, however, I was satisfied that it would be in the interest of justice to allow the respondent to participate in the hearing to the full extent and to rely on the submitted grounds of resistance and evidence and permitted the respondent to do so under Rule 21(3).

Postponement application

26. The respondent sought to postpone the hearing. Mr Cook pointed out that the hearing was listed for two hours and the remaining time was insufficient to deal with all substantive issues in both cases.

27. He also submitted that given the respondent had become aware of the proceedings only a few days ago, it had not been able to fully investigate all relevant matters and adequately prepare for the hearing.

28. The claimant opposed the respondent's application. He pointed out that the respondent was fully aware of all facts relevant to his claim since January 2020. He was content with the respondent defending the claim. Since on its own case, the respondent became aware of the claim on 22 October 2020, it should have had enough time to prepare for the hearing.

29. The claimant was happy with the hearing going beyond the allocated time. Mr. Cook said that he had another appointment at 3pm but was happy to continue until then. Later Mr. Cook was able to rearrange his 3pm appointment so that the hearing could be concluded, for which I am grateful. Ms. Moghadam said that she was also able to stay beyond the initially allocated time.

30. I decided that the hearing should proceed. I balanced the respondent's reasons for postponing the hearing against the claimant's points in opposition and refused the application because:
    (i) the parties were present and were able to continue beyond the allocated time,
    (ii) the respondent was represented by counsel,
    (iii) it was aware of the issues to be decided and was able to prepare its defence, which the claimant did not oppose despite it being presented late,

(iv) the facts upon which the claimant was relying in his claim were known to the respondent, and it did not explain what further investigations in needed to undertake to prepare for the hearing,
(v) the respondent said that it was no longer trading and in the process of preparing to enter administration, therefore delaying the hearing was likely to be prejudicial to the claimant if he ultimately succeeded in his claim,
(vi) Rule 2 of the Employment Tribunal Rules of the Procedure requires me to deal with cases fairly and justly, including, avoiding delay, so far as compatible with proper consideration of the issues.

Issues for the Tribunal to decide

31. Having dealt with the preliminary issues, I agreed with the parties the substantive issues I had to decide. These were:

Unlawful deduction from wages in respect of salary

32. Did the respondent make an unlawful deduction from the claimant's wages by failing to pay his salary for the period between 21-28 January 2020?

Breach of contract/notice pay

33. How much notice was the claimant entitled to receive? This was not in dispute. Under his contract of employment the claimant was entitled to eight weeks' notice.

34. Was the respondent in breach of the claimant's contract by failing to give him the requisite eight weeks' notice?

Mitigation

35. Mr. Cook initially raised the issue of whether the claimant had done enough to mitigate his losses, but quickly accepted that it was not an issue in relation to the unlawful deduction from wages claim, and on the facts was not relevant to the breach of contract claim in relation to the claimant's notice pay, and therefore I did not have to deal with that issue.

Findings of fact

36. Having heard the claimant's and Ms. Moghadam's oral evidence and having considered the documents, to which I was referred to by the parties, my findings of facts are as follows.

37. The respondent operated a fashion retail store in central London, at 20-21 Floral street, Covent Garden. The store closed on 20 January 2020.

38. The claimant was employed by the respondent as a Sales Manager/PR & Marketing Assistant from 16 August 2019 until his dismissal. His place of work was the Floral street Store.

39. The claimant's base gross salary was £24,000 per annum payable by equal monthly instalments in arrears. Under clauses 10.1.2 (ii) of the claimant's contract of employment the claimant was entitled to receive eight weeks' written notice of termination. Under clause 10.3.2 of the contract, on the giving of written notice of termination, instead of requiring the claimant to work his notice, the respondent had the option to make a payment of the claimant's base salary in lieu of notice (pages 43-44 of the bundle). That was not disputed by the respondent.

40. There was no agreement between the parties to vary these terms.

41. The claimant was informed by the respondent in or around mid-December that the store, in which the claimant had been working, was due to close in late January.

42. The respondent did not give the claimant oral notice of termination in or around mid-December 2019 and did not tell the claimant that the closure of the store in late January 2020 would result in the termination of the claimant's employment upon its closure. I reach this finding because:

    (i) I accept the claimant's evidence was that he had not been given any oral notice of the termination of his employment and that the respondent had not told him that the closure of the store would result in his dismissal upon the closure. He was cross-examined at length on this point by counsel for the respondent and forcefully denied that the respondent had given him any oral notice of the termination, or that it had made it clear to him that the store closure meant his dismissal.

    (ii) Although his primary duties were to manage the store, he was also responsible for other matters, such as managing the respondent's social media profile, and therefore the closure of the store did not automatically mean that his job had disappeared completely.

    (iii) I also accept his evidence that he was not involved in any management discussions regarding the company's financial situation or the ending of the lease and that he thought that the closure of the store meant that the store was relocating to a different place, and that it was only when he had received the email from Mr. Hopgood of 28 January 2020 that he had realised that he had lost his job.

    (iv) The respondent did not present any direct evidence to contradict the claimant's evidence. The respondent relied on the email of 4 February 2020 from Mr. Hopgood to the claimant as showing that the respondent had given the claimant oral notice of the termination in or around mid-December 2019, or that it should have been

obvious to the claimant that his employment would end upon the closure of the store. The email reads:

> *"Hi Fernando,*
>
> *If you want to have a discussion about me, with me then feel free to email me personally. Your characterisation of me as somehow being a person that has disadvantaged you would hold up, if it weren't for the fact that I am in the same situation as you now. You need to realise that whilst you have a contract (which was actually never signed on the companies behalf), that does not change the fact that the company doesn't have the money to pay you - administrators are going to be appointed and they will decide how the companies assets are disbursed, please see below email for details*
>
> *Please find the companies response to your original email below:*
>
> *Dear Fernando,*
>
> *You accepted employment to work in our Floral Street pop up store with knowledge that the store was temporary. Everyone has known for at least a month (you for longer than most of the staff) that the lease on the shop was ending.*
>
> *You were made fully aware that the store was closing its doors on 19th January 2020. You had been working with us since the 20th of December to promote a big clearance/closing down sale and helped us pack all the stock so it can go into storage. You had been aware of the closing of the store with all this activity going on and the fact that Louis informed all staff verbally of the financial situation and the fact that the lease was to run out.*
>
> *If you wish to hire a lawyer / contact the administrators once appointed to recover any salary that may or may not be owed that is your decision. Once administrators have been appointed you will be provided with their contact details so that you can lodge a claim against the companies assets.*
>
> *As you know, the business is under severe financial pressure. The company understands that this is not an*
> *ideal situation, we would much prefer that the shop remained open and you remain employed as you have been a good store manager, however it is very clear that this is not a surprise to you and that the formality of written notice is the issue here.*
>
> *We wish you the best of luck for the future.*
>
> *Best,*
>
> *Perfect Five Studio Limited"*

(v) I prefer the claimant's evidence on this issue. The email of 4 February 2020 does not say that the claimant had been given oral notice or that he had been told that the closure of the store would result in his dismissal. The email is not a contemporaneous document. It was written after the claimant had been dismissed and in response to the claimant's emails of 29 January 2020 and 4 February 2020 to the respondent (pages 54 and 55 of the bundle), in which he complained that he had not been given formal written

termination notice. The respondent chose not to call Mr. Hopgood to give evidence.

43. The respondent terminated the claimant's contract of employment on 28 January 2020 without giving him his contractual eight weeks' written notice. That was done by an email sent to the claimant by Mr. Hopgood on 28 January 2020 at 12:52pm.

> *"Hi Fernando,*
>
> *Find attached your final payslip and P45. Unfortunately, the company was only able to pay the employees for hours actually worked before we had to vacate the shop.*
>
> *I did ask about your laptop but they refused the request, I don't think any employer would have done this to be honest but I did try.*
>
> *Thank you for all your hard work to make the shop a success, it's a shame the business couldn't carry on and we are all out of jobs but its been great working with you!*
>
> *Best,*
> *Louis*
> *--*
> *Louis Hopgood*
> *Finance Manager"*

44. The respondent did not give the claimant any other written or oral notice of termination of his employment.

45. The respondent did not pay the claimant his wages for the period between 21-28 January 2020.

46. The respondent did not make a payment in lieu of notice.

Relevant law and conclusions

Unlawful deduction from wages in respect of salary

47. Section 13 of the Employment Rights Act (ERA) prohibits an employer from making a deduction from wages of a worker employed by him unless—

> (a) 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
> (b) the worker has previously signified in writing his agreement or consent to the making of the deduction.

48. A deduction is a complete or partial failure to pay what was properly payable on a particular occasion (*section 13(3) ERA*).

49. If a worker suffers an unlawful deduction from his wages, section 23 ERA gives him the right to complain to an employment tribunal. If the tribunal finds a complaint under section 23 well-founded, it shall make a

declaration to that effect and order the employer to pay to the worker the amount of any deduction made in contravention of section 13 (*section 24 of ERA*).

50. The claimant's case is that he was dismissed on 28 January 2020. The dismissal was communicated to him by an email from Mr. Louis Hopgood, Finance Manager, of the respondent, attaching the claimant's P45. Which was the first time he received written notice and he says that no dismissal was effective except a written dismissal. Therefore, he should be entitled to receive his salary until that date.

51. The respondent's position is that the claimant was dismissed on 20 January 2020 when the store in which the claimant had been working closed, and that it was inconceivable that the claimant, as the store manager, could have understood the closure of the store as meaning anything else other than the end of his employment with the respondent. Therefore, no wages were due to the claimant for the period between 21-28 January 2020, but otherwise the respondent did not argue that the claimant's salary for that period would not have been properly payable, or that the deduction was authorised under section 13 of ERA, or that it was an exempt deduction under section 14 of ERA.

52. Mr. Cook referred me to the case of ***Cosmeceuticals Ltd -v- Ms.T Parkin: UKEAT/0049/17***. He said that the case established that the effective date of termination was a statutory concept, and once an employee was dismissed on a particular date, it was not open to the parties to agree a later date, as the effective date of termination, and the correct effective date of termination is the date the employee was dismissed.

53. Given my findings of facts in paragraph 43 of this judgment, I do not see how that authority assists the respondent. The claimant was not dismissed by the respondent on 20 January 2020 and there was no subsequent agreement between the parties to treat 28 January 2020 as the date of his dismissal. The 28th of January 2020 was the date when the claimant was dismissed by the respondent without notice and therefore it is the effective date of termination of his employment.

54. For the reasons set out in paragraphs 42(i) to 42(v) I also reject the respondent's argument that the closure of the store on 20 January 2020 had the effect of terminating the claimant's contract of employment or giving him notice of the termination.

55. Given my finding of fact that the claimant was dismissed on 28 January 2020 and not before, it follows that the respondent has made an unauthorised deduction from the claimant's wages by falling to pay him his salary for the period between 21-28 January 2020 and shall pay the claimant his base gross salary for that period in the sum of **£461.54**.

Breach of Contract/Notice Pay

56. A dismissal by the employer of his employee in breach of the employee's contract of employment gives rise to a claim for damages for wrongful dismissal at common law.

57. Under the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 ("the Order") the tribunal has jurisdiction to determine such claim if it arises or is outstanding on the termination of employment.

58. If the contract gives the employer the right, instead of giving the employee the requisite notice, to make a payment in lieu of notice, and the employee is dismissed without the requisite notice, and the employer does not make a payment in lieu of notice, the employee is entitled to damages on the ordinary contractual principles (*Cerberus Software Ltd v. Rowley 2001 376, CA*).

59. The terms of the claimant's contract of employment required the respondent to give the claimant eight weeks' written notice to terminate his employment (clause 10.1.2(ii)). Pursuant to clause 10.3.2 of the contract, on the giving of written termination notice the respondent had the choice to require the claimant to work the notice period, or to make a payment of the claimant's base salary in lieu of notice.

60. The claimant's case is that his contract requires written notice, that the only notice he received was the email from Mr. Hopgood on 28 January 2020, and that he never agreed or accepted that oral notice could be given instead. Further, he says that he was never given oral notice anyway.

61. The respondent argues that the claimant was made aware sometime in or around mid-December that the store, in which the claimant had been working would be closing on 20 January 2020 and therefore the claimant was given oral notice of termination in or around mid-December. It says that therefore the claimant was only entitled to around three weeks' pay in respect of the remaining period of his notice. In support of that contention the respondent relies on the email from Mr. Hopgood to the claimant of 4 February 2020.

62. For the reasons explained in paragraph 42 I find that the respondent did not give the respondent oral notice of the termination.

63. Even if oral notice had been given by the respondent to the claimant, which my finding of fact is that it had not, I reject the respondent's contention that it would have been valid notice of the termination. The claimant's contract of employment requires notice of the termination to be given in writing, and the respondent did not provide any evidence to show that the parties had agreed to vary that term so as to allow the respondent to give oral notice instead, and my finding of fact is that no such variation was agreed between the parties.

64. By terminating the claimant's employment by email on 28 January 2020 without giving the claimant the required eight weeks' notice and by failing to make a payment in lieu of notice, as it could have done under clause 10.3.2 of the contract, the respondent breached the claimant's contract of employment and is liable to pay damages to the claimant assessed on the ordinary contractual principles.

65. It follows that the claimant's claim for breach of contract in respect of his notice pay succeeds. I assessed damages by reference to the claimant's base salary for a period of eight weeks in the sum of **£3,692.32.**

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Employment Judge P Klimov
23 November 2020

Sent to the parties on:

24/11/2020

For the Tribunals Office

Notes

Public access to employment tribunal decisions

Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant (s) and respondent(s) in a case.