



EMPLOYMENT TRIBUNALS

Claimant: Mr T Dworczyk

Respondent: Top Stone Distribution Limited
Heard at: Reading **On:** 27 July 2017

Before: Employment Judge Gumbiti-Zimuto

Representation:
Claimant: In person
Respondent: Mr Slawomir Zapotoczny (Director of the respondent)

JUDGMENT

1. The respondent has made an unauthorised deduction from the claimant's wages. The respondent is ordered to pay to the claimant £2269.80. This is the gross amount. If the respondent pays the tax and national insurance due to HMRC, payment of the net amount will meet the judgment debt.
2. The respondent failed to pay the claimant in lieu of entitlement to annual leave. The respondent is ordered to pay to the claimant the sum of £593.20.

REASONS FOR JUDGMENT

1. The claimant claims that he is entitled to unpaid wages for August and September 2016, the claimant claims £2269.08. He makes a further claim in respect of holiday pay, the claimant claims £593.20. The respondent denies that the claimant is entitled to payment for August and September 2016, it is the respondent's case that the claimant in fact did not work for which he is entitled to be paid in those months. The respondent accepts that the claimant is entitled to be paid holiday pay but contends that it should be limited to holiday pay reflecting employment in May, June and July but not in respect of August and September.
2. The claimant has produced pay slips which show that the claimant having an entitlement to £1134.64 (August 2016), £1134.44 (September 2016) and £593.20 (holiday pay). There is no issue between the parties as to the calculation of the amounts. The issues between the parties are:

- (i) Whether the claimant was employed on the terms of a contract of employment dated 30 April 2016 or some other terms;
 - (ii) Whether the claimant in fact worked in August and September 2016 so as that wages are properly payable to him for this period; and
 - (iii) Whether the claimant should be paid holiday pay on the basis that the claimant was employment from May to July or from May to September.
3. There appeared initially be an issue between the parties as to whether the claimant was employed by the respondent at all however it became clear during the evidence that there was no issue between the parties as to whether the claimant was an employee of the respondent. The issue emerged as whether Mr Przemyslaw Dabkowski, at the relevant time a director of the respondent, was able to contract with the claimant so as to bind the respondent by the 30 April 2016 contract.
 4. Mr Przemyslaw Dabkowski and Mr Slawomir Zapotoczny agreed that Mr Przemyslaw Dabkowski would set up a business in the United Kingdom involving the sale of stone products on line. Mr Slawomir Zapotoczny, who was based in Poland was to provide the finance. Mr Przemyslaw Dabkowski who based in the United Kingdom was to set up the company and arrange for the recruitment of the staff.
 5. Mr Slawomir Zapotoczny agrees that in pursuance of this agreement Mr Przemyslaw Dabkowski registered the respondent company and was a director and shareholder. It is also agreed that the claimant was employed by the respondent to work in the role of sales manager, however his actual duties in the first three months were wide and varying including matters which went beyond the role of sales manager.
 6. There is however dispute between the Mr Slawomir Zapotoczny and Przemyslaw Dabkowski as to whether the claimant was to be employed for three months on a salary and after three months for the employment to cease, the claimant becoming self-employed and for the claimant to thereafter be paid on a commission only basis.
 7. The claimant produced a contract of employment that included the following provisions: “2. The employee will commence permanent fulltime employment with the employer on the 30th day of April 2016”; 8. Compensation paid to the Employee for services rendered by the Employee s required by this Agreement will include a wage at the rate of £8.00 plus a commission according to the following formula: 10% of the gross turnover from customers acquired personally.”
 8. The claimant produced Full Payment Submissions to the inland revenue which show the claimant recorded as receiving payment of £1272.00 in May 2016, £1280.00 in June July 2016. There are also submissions form August and September 2016 showing payment of £1280.00 for each month. The claimant produced pay slips for August and September 2016

- which showed an entitlement to pay at the rate of £8 per hour for 160 hours a month.
9. Mr Slawomir Zapotoczny agreed that the claimant was entitled to the payment made to him May, June and July and that he had been properly paid.
 10. Mr Slawomir Zapotoczny stated however that he was unaware of the existence of the claimant's contract of employment until October 2016 when he was provided with an electronic copy by the accountant, he did not see the signed version until December 2016. I am satisfied that this evidence is correct as regards to when he saw the actual contract.
 11. I am however of the view that the existence of the agreement was known to Mr Slawomir Zapotoczny before this date. I come to this conclusion because it is agreed that the claimant was employed. The pay that the claimant received and it is agreed he was entitled to is in accordance with the agreement. There was also produced an email showing that the contract was provided to the accountant on 17 May 2016. In the light of all these matters I am satisfied that it is more likely than not that the claimant was employed by the respondent on the terms of the 30 April 2016 agreement and also that even if Mr Slawomir Zapotoczny was unaware of the written agreement he was aware of the terms.
 12. There is no dispute that Mr Przemslaw Dabkowski had the authority to enter into the agreement with the claimant. Mr Slawomir Zapotoczny contends that in fact that did not happen. What Mr Slawomir Zapotoczny says is that it was understood that the claimant was to be a salaried employee for three-months followed by self-employment on commission only basis. Mr Slawomir Zapotoczny suggested that the purported agreement must have been entered into after the claimant's employment ended because he saw the document for the first time in October 2016. Mr Slawomir Zapotoczny accepted that because he was based in Poland he had never met the claimant in the time he was employed by the respondent. Mr Slawomir Zapotoczny spoke to the respondent's accountant for the first time in September 2016 and met her for the first time in December 2016.
 13. The claimant was entitled to be paid on the basis of the 30 April 2016 contract.
 14. The pay for August and September 2016 was only payable if the claimant in fact did work in those months. The evidence of the claimant was that he did work in those months. The claimant explains the drop of in work in the months of August and September 2016 on the basis that there had been a failure on the part of Mr Slawomir Zapotoczny to continue to provide finance for the business and so bills for telephones and other services

were not paid which hampered this internet business from being able to trade effectively.

15. Mr Slawomir Zapotoczny states that the claimant did no work in August and September 2016. He says that the claimant should have been working in these months (albeit on commission not on a salary).
16. The parties have not produced to me any evidence that allows me to form any conclusion on their competing contentions. They both appear to agree that there was a drop of in work in August and September. I found the claimant to be a credible witness I found what he said easy to accept. Where it was possible to do so the claimant produced documents to support his case. I found that I was able to believe him when he says he worked in August and September 2016.
17. Mr Slawomir Zapotoczny although limited by having to use the services of an interpreter was clear in what he said. He too gave his evidence in a credible way, however I did not accept what he said about the employment contract. He produced no documents to support his case. His evidence was that the claimant did not do any work in August and September. While I found him a credible witness this evidence that he gave did not discredit the evidence given by the claimant.
18. In the circumstances, I am satisfied that the claimant worked in August and September 2016 and is entitled to be paid.
19. The claimant's employment with the respondent continued to the end of September 2016. The claimant is entitled to holiday for the entire period of his employment. The respondent accepts that the claimant is entitled to holiday pay. The amount that the claimant claims is entitled to recover should cover the entire span of his employment and not just May to July.
20. The claimant's complaints succeed.
21. The respondent made an unlawful deduction in the claimant's wages in the sum of £2269.08. The claimant is entitled to be paid the sum of £593.20 in respect of untaken holiday.

Employment Judge Gumbiti-Zimuto
Date: 18 August 2017

JUDGMENT SENT TO THE PARTIES ON

.....18/08/2017.....

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FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS

Case Number: 3347704/2016