



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr S Maddocks

**Respondent:** Bayscope Trading Limited

**Heard at:** Manchester

**On:** 7 July 2017

**Before:** Employment Judge Porter

## **Representation**

Claimant: In person

Respondent: Mr Miah, director

**JUDGMENT** having been sent to the parties on 13 July 2017 and written reasons having been requested by the respondent in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

## **REASONS**

### **Issues to be determined**

- 1 At the outset it was confirmed that the issues were:
  - 1.1 whether time should be extended to allow the Response to be entered;
  - 1.2 whether the complaint succeeds or fails, that is:
    - 1.2.1 whether the respondent had failed to provide the claimant with pay slips for the period of 5 months leading up to termination of employment;

- 1.2.2 what was the commencement date of the claimant's continuous employment with this respondent;
- 1.2.3 whether the respondent had failed to pay to the claimant holiday pay from July 2015 in accordance with the claimant's statutory entitlement;

**Application by respondent for extension of time to present the Response and to defend the claim**

- 2 This application was considered first.
- 3 Evidence was heard from Mr Syed Miah, director of the respondent company.
- 4 The respondent asserted that:
  - 4.1 the respondent was unaware of the claim until Mr Miah received the claim form on 5 April 2017;
  - 4.2 he had insufficient time to prepare a response. He immediately telephoned the tribunal and after speaking to the clerk made application for an extension of time to enter the response;
  - 4.3 the respondent is entitled to defend the claim, which is without merit;
  - 4.4 there is no proposal to strike the company from the register. The company is still trading and investigations will begin immediately with the respondent's accountant to ensure that the respondent has complied with all Companies House requirements.
- 5 The claimant asserted that:
  - 5.1 the respondent is merely stalling for time;
  - 5.2 there is a proposal to strike the company from the register.

**Facts**

- 6 Having considered all the evidence the tribunal has made the following findings of fact. Where a conflict of evidence arose the tribunal has resolved the same, on the balance of probabilities, in accordance with the following findings.

- 7 The claim was presented on 1 March 2017.
- 8 The claim was served upon the respondent on 8 March 2017 by sending a copy of the claim form to the address provided in the claim form. The respondent was required to send a response to the claim by no later than 5 April 2017.
- 9 The respondent trades from the address provided in the claim form, which is a single unit in a business park. It is not always manned. The respondent has a post box outside the unit for delivery of mail. The respondent sometimes has problems with post being incorrectly delivered. At times post is given to the site office, or is delivered to a different unit, and is at a later point delivered to the respondent's unit by, for example, another site unit owner dropping mail into the respondent's post box. The respondent is unable to identify exactly when the post was delivered to the business unit.
- 10 On 5 April 2017 Mr Miah opened the respondent's post box and saw, for the first time, the letter from the employment tribunal enclosing the claimant's claim form.
- [On this the tribunal accepts the evidence of Mr Miah.]*
- 11 Mr Miah immediately contacted the tribunal by telephone and by email dated 6 April 2017 sought an extension of time for entering a Response.
- 12 By letter dated 27 April 2017 the respondent was advised that the request was refused because no reason had been given as to why the respondent only saw the tribunal papers on 5 April 2017 when they had been sent on 8 March 2017.
- 13 By letter dated 27 April 2017, received on 2 May 2017, the respondent repeated the request for an extension of time and provided an explanation for the delay and a completed Response.
- 14 As a result the original hearing date of 17 May 2017 was postponed.

## **Law**

- 15 Rule 16 (1) of the Tribunal Rules of Procedure 2013 stipulates that a respondent must present his or her response to the tribunal office within 28 days of the date on which the copy of the claim form was sent by the tribunal.

- 16 An application for an extension of time for presenting a response may be made. The tribunal has a discretion to extend the time limit for presenting a response. In exercising its discretion the tribunal must consider the overriding objective to deal with cases fairly and justly.

#### **Determination of the application**

- 17 The tribunal accepts the evidence of Mr Miah that the first time the respondent was aware of the claim form, and the requirement to enter a Response, was on 5 April 2017. The respondent acted promptly, making application for an extension of time and subsequently providing an explanation for the delay and a copy of the proposed response. The response was received on 2 May 2017. As a result the original hearing date of 17 May 2017 was postponed. There has therefore been a short delay in the determination of this claim resulting from the failure to enter the Response in time. However, the tribunal accepts the evidence of Mr Siah that the reason for the delay arises from the late, admittedly unexplained, delivery of the claim form to the respondent's post box. The delay has not been caused by the wish of the respondent to delay the hearing of the claim. Having considered all the circumstances the tribunal finds that the prejudice to the respondent in refusing the application outweighs any prejudice the claimant in granting it. The tribunal notes that the respondent company continues to trade. It currently remains on the Companies House register. Steps can be taken, as appropriate, to ensure that the company remains on the Register to enable any enforcement of any award to take place. The extension of time to allow the respondent to defend the claim is fair and just, consistent with the overriding objective.
- 18 Time is extended for the submission of the Response to 2 May 2017. The respondent is entitled to defend this claim

#### **Claim for holiday pay and failure to provide itemised pay statements**

##### **Orders**

- 19 A number of orders were made for the conduct and good management of the proceedings during the course of the Hearing. In making the orders the tribunal considered the overriding objective and the Employment Tribunals Rules of Procedure 2013. Orders included the following.
- 20 After the tribunal announced its decision that the time for entering a response was extended to allow the respondent to defend the claim, EJ Porter confirmed that the claim would now proceed to hearing. The respondent indicated that he was not prepared for a full hearing and had not brought all of his documents with him. The tribunal noted that:

20.1 by letter dated 5 May 2017 the parties were advised by the tribunal that the hearing was relisted to consider:

20.1.1 whether the time that should be extended to allow the response to be entered;

20.1.2 whether the complaint succeeds or fails

The letter advised that:

The parties must put their documents into a page numbered bundle to each other not less than 14 days before the hearing (by no later than 23 June 2017.)

20.2 the claimant has entered into correspondence with the tribunal, copied to the respondent, relating to the disclosure of documents. He forwarded copies of his documents to the respondent and to the tribunal. He notified the tribunal that the respondent had failed to send to the claimant any documents prior to the hearing;

20.3 the respondent has prepared a small bundle of documents containing some relevant documents;

20.4 the claimant has provided a company search indicating that there is a proposal to strike the respondent company from the register.

21 In all circumstances the tribunal is satisfied that:

21.1 the respondent was fully aware that this hearing would proceed to determine the substantive merits of the claim;

21.2 the respondent was fully aware of the requirement to disclose all documents before the hearing;

21.3 the respondent has failed to provide any relevant documents to the claimant in advance of this hearing;

21.4 the claimant has complied with the duty to disclose all relevant documents;

21.5 it is in the interests of justice to proceed with the hearing today and to reject any application by the respondent for an adjournment. The respondent has had full opportunity to prepare for this hearing. The prejudice to the claimant in allowing an adjournment outweighs any prejudice to the respondent in refusing the request.

- 22 The respondent asserted that the claimant had breached the contract of employment by failing to give notice of termination of employment and by setting up in competition with the respondent, taking with him confidential information and soliciting the respondent's customers' business. The claimant denied each of these allegations. EJ Porter noted that:
- 22.1 the parties agreed that the claimant's last day of working was 6 January 2017. The respondent subsequently agreed to pay to the claimant notice pay and the claimant was paid until 20 January 2017;
- 22.2 The matters raised by the respondent are irrelevant to the issues to be determined by the tribunal. No evidence would be heard in relation to these allegations.

### **Submissions**

- 23 The claimant made a number of detailed submissions which the tribunal has considered with care but does not rehearse in full here. In essence it was asserted that:-
- 23.1 the respondent company took over the business in which the claimant was employed in June 2015, when there was a TUPE transfer;
- 23.2 the respondent company failed to pay the claimant holiday pay from that date onwards;
- 23.3 the respondent failed to provide the claimant with pay slips from July 2016 to the date of termination of his employment.
- 24 The representative for the respondent made a number of detailed submissions which the tribunal has considered with care but does not rehearse in full here. In essence it was asserted that:-
- 24.1 the respondent took over the running of the business on 5 February 2016. The claimant was employed by the respondent company from that date;
- 24.2 there was no TUPE transfer from the previous owners of the business in 2015;
- 24.3 The respondent took over the lease of the business premises in February 2016. It employed to the claimant from that date;

- 24.4 the claimant was paid holiday pay throughout his employment with the respondent – he was paid all monies due and owing to him;
- 24.5 the claimant was provided with payslips throughout his employment with the respondent;
- 24.6 the claimant is making a false claim because the respondent informed him that it was considering pursuing him through the police and/or courts for theft of confidential information;
- 24.7 the respondent shut down for the Christmas period in 2016/17, when the claimant took annual leave, and the claimant was paid in full during the shutdown;
- 24.8 the February pay slip is incorrect as it does not specifically make reference to the payment of holiday pay for the Christmas shut down. However, holiday pay was paid and is included in the description of the basic wages paid at that time;
- 24.9 the business reopened on Friday 6 January 2017 when the claimant handed in his notice;
- 24.10 the respondent paid the claimant two weeks in lieu of notice as the respondent company did not want the claimant to continue to work for them;
- 24.11 the claimant was employed to work 37 hours per week at the hourly rate of £8.50.

## **Evidence**

- 25 The claimant gave evidence. He called no witnesses.
- 26 The respondent relied upon the evidence of Mr Miah.
- 27 The witnesses were subject to cross-examination, questioning by the tribunal and, where appropriate, re-examination.
- 28 The claimant relied upon an email from Mr Akikur Rahman, a director of a previous employer and owner of the business. The claimant had not, as advised by the tribunal in correspondence, provided a signed witness statement from Mr Rahman. The tribunal agreed to consider the email as part of the documentary evidence, noting that it was a question of how much weight it was prepared to attach to the evidence of a potential witness who had not prepared a signed witness statement, had not

attended tribunal and could not be questioned on the veracity of their evidence.

- 29 Each party provided copies of their own documents. There was no agreed bundle.

### **Facts**

- 30 Having considered all the evidence the tribunal has made the following findings of fact. Where a conflict of evidence arose the tribunal has resolved the same, on the balance of probabilities, in accordance with the following findings.

- 31 The claimant commenced working for Newton Auctioneers Ltd on 20 October 2013. He was not provided with a written contract or a statement of terms and conditions of employment.. There was no defined holiday year. The dates of any holidays were agreed verbally at the time.

- 32 Mr Rahman was a director of the employer company at that time. In or around June 2015 Mr Rahman explained to the claimant and other employees that he was selling the business to Mr Miah. The claimant and the other employees were told that it would not affect their employment in any way. Mr Miah and his brother started working in the business in or around September 2015, when a sale and purchase agreement was signed. They worked jointly with Mr Rahman for a handover period of two weeks. After that Mr Rahman left. Nothing was said to the claimant either verbally or in writing about the effect of the takeover of the business on his employment. The employees remained the same. There was no change to the claimant's hours of work or rate of pay or place of work. His duties remained the same. There was no close down of the business. The business of Newton Auctioneers Ltd was bought by the respondent company and continued to operate without any gap during the handover period.

*[On this the tribunal accepts the evidence of the claimant. The tribunal places no weight on the e-mail of Mr Rahman. The evidence of Mr Miah in relation to the date of the take over of the business by the respondent company has been unsatisfactory.]*

- 33 From the time the respondent took over the business the claimant was not paid for annual leave. He asked for payment but was denied it. Mr Rahman assured the claimant that the company would give holiday pay when the business picked up. The claimant was aware of his employment rights but did not pursue the matter any further at that time as he had a lot of other personal problems.



*[On this the tribunal accepts the evidence of the claimant.]*

34 The claimant and other employees were required to take their annual leave during the periods the business was shutdown for Christmas/New Year, and Ramadan.

35 The claimant took the following annual unpaid annual leave:

35.1 8 days in October 2015;

35.2 10 days in December and January 2015/16 for the Christmas shut down;

35.3 3 days in March 2016;

35.4 6 days in June 2016,

35.5 10 days for the Ramadan shut down which was in July 2016;

35.6 10 days for the Christmas shut down in December/January 2016/7.

*[On this the tribunal accepts for the large part the evidence of the claimant. The tribunal accepts the evidence of Mr Siah in relation to the dates of Ramadan. Both parties agreed that the business shut down for Ramadan, that the employees were required to take their annual leave over that period. The claimant accepts that his recollection of those dates is not good.]*

36 In February 2016 Newton Auctioneers Limited assigned to the respondent the remainder of the lease of the business premises, having obtained the landlord's consent to the assignment.

37 The claimant worked 5 days per week, Monday – Wednesday, Friday – Saturday, with Thursday and Sunday off. The claimant was employed to work 37.5 hours per week. He was paid the agreed hourly rate of £8.50 per week. His gross weekly wage was £318.00.

*[The gross weekly wage and number of hours worked are as set out in the Claim form and agreed in the Response. Both parties have given evidence inconsistent with that previously agreed statement. On balance the tribunal accepts that the Claim Form and Response are the more reliable statements as to the amount of pay.]*

38 The respondent kept records of the hours of work of each employee to provide information to the company's accountant for preparation of the pay

slips and to organise the monthly pay. The claimant was paid on the 5<sup>th</sup> of each calendar month for the previous calendar month.

- 39 From July 2016 to the termination of his employment the claimant was not provided with any pay slips.

*[On this the tribunal accepts the evidence of the claimant. The respondent has failed to provide any documentary or other corroborative evidence to support Mr Miah's assertion that pay slips were provided in this period.]*

- 40 On or around 4 January 2017 the claimant gave notice of termination of employment. The respondent paid the claimant two weeks in lieu of notice as the respondent company did not want the claimant to continue to work for them. His last day of work was 6 January 2017.

- 41 After termination of employment the respondent provided the claimant with a pay slip dated 5 February 2017. That was pay for the month of January 2017. It indicates payment for 88 hours at the hourly rate of £8.50. It does not indicate any payment for holiday pay. It does include the following:

Gross for Tax TD	£10,642.00
Tax paid TD	£286.20
Nat Ins TD	£499.77

- 42 The claimant paid on the presentation of his claim tribunal fees in the sum of £160.00.
- 43 The claimant is required to pay a hearing fee of £230.00. His claim for remission has not been successful. He is obliged to pay that sum. It is the practice of the tribunal administration to enforce payment of that hearing fee.

## **The Law**

- 44 Under Regulations 13 and 13A Working Time Regulations 1998 workers have the right to a minimum of 5.6 weeks' paid annual leave. This amounts to 28 days for a full time worker. There is a pro-rate entitlement for part-time workers.
- 45 Under the Regulations, workers are entitled to be paid during statutory annual leave at a rate of a week's pay for each week of leave. On termination of employment each worker is entitled to payment for accrued holiday pay, calculated in accordance with the regulations. The definition of a "week's pay" is as set out in Sections 221 to 224 of the Employment Rights Act 1996 ("ERA 1996").

- 46 Under section 23 ERA 1996 there is a time limit for presenting a claim of unlawful deduction from wages. An employment tribunal shall not consider a complaint unless it is presented before the end of the period of three months beginning with the date of payment of the wages from which the deduction was made. Time may be extended if it was not reasonably practicable to present the claim in time and the claim is presented within a reasonable time thereafter.
- 47 Where a complaint is brought in respect of a series of deductions time runs from the last deduction or payment in the series.
- 48 In **Fulton v Bear Scotland Limited** UKEATS/0010/16 the EAT confirmed that a break of more than three months between non-payment or underpayment of wages breaks the series of deductions.
- 49 Under section 23 (4A) ERA 1996 the tribunal shall not consider so much of complaint brought under that section as relates to a deduction where the date of payment of the wages from which the deduction was made was before the period of two years ending date of presentation of the complaint.
- 50 In determining whether a relevant transfer has occurred it is necessary to determine whether there has been the transfer of an undertaking, business or part of an undertaking or business situated immediately before the transfer in the United Kingdom to another person where there is a transfer of an economic entity which retains its identity, Regulation 3(1)(a). Transfer of Undertakings (Protection of Employment) Regulations 2006 ("TUPE 2006").
- 51 Factors to consider include the following:
- 51.1 whether the entity in question retains its identify, as indicated, among other things, by the fact that its operation is actually continued or resumed;
  - 51.2 in the labour intensive sector it is to be recognised that an entity is capable of maintaining its identity after it has been transferred where the new employer does not merely pursue the activity in question but also takes over a major part, in terms of their numbers and skills, of the employees especially assigned by his predecessors to that task;
  - 51.3 whether or not its tangible assets are transferred, the value of its intangible assets at the time of transfer, whether or not the majority of its employees are taken over by the new company, whether or not its customers are transferred, the degree of similarity between

the activities carried on before and after the transfer, and the period, if any, in which they were suspended.

52 Regulation 4(1) of TUPE 2006 states:-

"Except where objection is made under paragraph (7), a relevant transfer shall not operate so as to terminate the contract of employment of any person employed by the transferor and assigned to the organised grouping of resources of employees that is subject to the relevant transfer, which would otherwise be terminated by the transfer, but any such contract shall have effect after the transfer as if originally made between the person so employed and the transferee."

53 Under s8 ERA 1996 an employee has a right to be given a written itemised pay statement as described in section 8. A reference to the tribunal may be made under section 11 ERA 1996, which provides that:

(4) where on a reference... the tribunal further finds that any unnotified deductions have been made (from the pay of the employee during the period of 13 weeks immediately preceding the date of the application for the reference (whether or not the deductions were made in breach of the contract of employment), the tribunal may order the employer to pay the employee a sum not exceeding the aggregate of the unnotified deductions so made.

54 Where a claimant has been required to pay fees for the issue of the claim and the hearing, and is successful in his claim, it may be appropriate that the respondent be ordered to reimburse the claimant with those fees pursuant to Rule 75(1)(b) of the Tribunal Rules of Procedure 2013..

### **Determination of the Issues**

(This includes, where appropriate, any additional findings of fact not expressly contained within the findings above but made in the same manner after considering all the evidence)

55 The tribunal has considered all the evidence, findings of fact and submissions from both parties, in particular, the following.

56 Whereas the tribunal notes that at times the claimant has been inconsistent in his recollection of dates of certain events, the tribunal finds that the claimant has been consistent throughout in his assertion that he was not paid holiday pay. It is unfortunate that the claimant did not choose to pursue his claim for holiday pay through the tribunals earlier, especially as he was aware of his employment rights. However, the tribunal rejects the respondent's assertion that the claimant is making a false claim

because the respondent informed him that it was considering pursuing him through the police and/or courts for theft of confidential information.

- 57 Whatever the motivation for the claimant's claim, the respondent has been fully aware that the claim before the tribunal today was that the claimant had not been paid holiday pay. The respondent asserts that the claimant has been paid holiday pay throughout. However, the respondent has not adduced any satisfactory documentary evidence in support of its assertion. No satisfactory evidence has been provided by the respondent as to the amount of pay paid to the claimant in the relevant period. It is accepted that the respondent kept records of the hours of work to provide information to the company's accountant for preparation of the pay slips and to organise the monthly pay. None of those records are provided. There is no evidence from the accountant as to his instructions, if any, for the payment of holiday pay. The only relevant document, a pay slip, is provided by the claimant: a payslip for February 2017. That document supports the claimant's case that he was not paid holiday pay.
- 58 The respondent accepts that the claimant was paid on the 5<sup>th</sup> of each calendar month for the previous holiday month. On the respondent's own case:
- 58.1 the claimant would have been paid on 5<sup>th</sup> February 2017 for the period 1-20 January 2017;
- 58.2 that is a total of three working weeks as the claimant worked Monday – Wednesday, Friday – Saturday, with Thursday and Sunday off;
- 58.3 that would be a total of 111 hours.
- The claimant was in fact paid on 5 February 2017 for 88 hours. The respondent is unable to provide a satisfactory explanation for that discrepancy.
- 59 On balance the tribunal has accepted the evidence of the claimant and finds that he was not paid holiday pay during the course of his employment with this respondent, from the date of the TUPE transfer.
- 60 The claimant was employed by the respondent and is entitled to his holiday pay. He was not paid holiday pay from July 2015. No holiday year was set. Therefore his holiday year begins on 20 October each year.
- 61 There was a TUPE transfer from Newton Auctioneers Limited to the respondent company in September 2015. There was a sales agreement for the sale of the business in September 2015, when Mr Miah started working at the premises and the previous employer informed the claimant and others that he was selling the business, that this did not affect their

employment. There was a transfer of an economic entity from Newton Auctioneers Limited to the respondent company, which economic entity retained its identity following the sales agreement. The fact that the assignment of the lease of the business premises was delayed until February 2016 does not mean that there was no relevant transfer in September 2015. The operation of the business actually continued, the employees continued, the activities carried on before and after the transfer remained the same.

- 62 Again, the respondent has adduced no evidence of wage records to show when it took over responsibility for payment of the claimant's wages.
- 63 The rights and liabilities for all employees transferred to the respondent company on that TUPE transfer. That included the right to be paid holiday pay.
- 64 The claimant is entitled to be paid holiday pay for the period of 2 years from the date the claim form was presented, 1 March 2017. The relevant period is 1 March 2015 to 1 March 2017.
- 65 The claim is for a series of deductions. The tribunal must consider whether there is a three month gap between the dates on which the holiday pay was not paid, which stops the series.
- 66 The claimant claims holiday pay for:
- 66.1 8 days taken in October 2015;
  - 66.2 10 days taken in December and January 2015/16 for the Christmas shut down;
  - 66.3 3 days taken in March 2016;
  - 66.4 6 days taken in June 2016,
  - 66.5 10 days for the Ramadan shut down which was in July 2016. The date the holiday pay should have been paid was 5 August 2016;
  - 66.6 10 days for the Christmas shut down in December 2016/January 2017. A deduction was made from the claimant's wages on 5 January 2017 (for the dates taken in December 2016) and 5 February 2017 (for the dates taken in January 2017).
- 67 There was therefore a three month break between 5 August 2016, the date of the deduction in relation to the Ramadan shutdown, and 5 January 2017 (the date of the first deduction for the Christmas/New Year

shutdown). The claimant cannot pursue the claim for holiday pay before the dates of the deductions relating to unpaid annual leave in December/January 2016/2017.

- 68 It was reasonably practicable for the claimant to pursue the claim for the earlier deductions within the three months time limit. The claimant was aware of his legal rights.
- 69 The claimant is entitled to 10 days holiday pay for the Christmas 2016/New Year 2017 shut down, 2 weeks wages in the gross sum of £636.00.
- 70 The respondent is ordered to pay to the claimant the sum of £636.00.
- 71 The claimant was not given his pay slips from August 2016 to January 2017. On that the tribunal accepts his evidence. However the pay slip of 5 February 2017 sets out the total wages paid for the tax year and the amount paid to the revenue under the PAYE system. It is not appropriate to make any award of any sum for tax deducted. The claimant does not challenge the amounts stated in the pay slip to have been paid to HMRC under the PAYE system.

#### **Fees**

- 72 The claimant was entitled to pursue this claim. It is in the interest of justice that the respondent be ordered to reimburse the claimant with the tribunal fees paid and due and owing.

Employment Judge Porter  
Date: 21 August 2017

JUDGMENT SENT TO THE PARTIES ON  
25 August 2017

FOR THE TRIBUNAL OFFICE